No. 06-1082
Title: Virginia, Petitioner
v.
David Lee Moore
Docketed: February 5, 2007
Lower Ct: Supreme Court of Virginia
Case Nos.: (052619)
Decision Date: November 3, 2006
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 1 2007	Petition for a writ of certiorari filed. (Response due March 7, 2007)
Feb 22 2007	Waiver of right of respondent David Lee Moore to respond filed.
Mar 7 2007	DISTRIBUTED for Conference of March 23, 2007.
Mar 7 2007	Brief amici curiae of Texas, et al. filed. (Distributed)
Mar 14 2007	Response Requested . (Due April 13, 2007)
Mar 27 2007	Order extending time to file response to petition to and including May 14, 2007.
May 14 2007	Order further extending time to file response to petition to and including May 29, 2007.
May 29 2007	Brief of respondent David Lee Moore in opposition filed.
Jun 8 2007	Reply of petitioner Virginia filed.
Jun 13 2007	DISTRIBUTED for Conference of September 24, 2007.
Sep 25 2007	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Oct 16 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Oct 18 2007	Brief amicus curiae of Wayne County, Michigan filed.
Nov 5 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Nov 5 2007	Joint appendix filed. (Statement of costs filed)
Nov 5 2007	Brief of petitioner Virginia filed.
Nov 9 2007	Brief amici curiae of Texas, et al. filed.
Nov 13 2007	Brief amicus curiae of United States filed.
Nov 16 2007	SET FOR ARGUMENT Monday, January 14, 2008.
Nov 27 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 3 2007	Brief of respondent David Lee Moore filed.
Dec 7 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 7 2007	Brief amici curiae of American Civil Liberties Union, et al. filed.

Dec 10 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 10 2007	Brief amicus curiae of Virginia Trial Lawyers Association filed.
Dec 10 2007	Brief amicus curiae of American Bar Association filed.
Dec 11 2007	Record received from Circuit Court of Virginia. (1 envelope)
Dec 12 2007	CIRCULATED.
Dec 13 2007	Record received from Appeals Court of Virginia. (1 envelope)
Dec 14 2007	Record received from the Supreme Court of Virginia. (1 envelope)
Dec 21 2007	Motion of American Bar Association out-of-time for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 28 2007	Reply of petitioner Virginia filed. (Distributed)
Jan 4 2008	Motion of American Bar Association for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Jan 14 2008	Argued. For petitioner: Stephen R. McCullough, Deputy State Solicitor General, Richmond, Va.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Thomas C. Goldstein, Washington, D.C.

Supreme Court, U.S.
FILED

No. 06-061082

FEB 01 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Commonwealth of Virginia

February 1, 2007

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

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PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

INTRODUCTION

This Petition concerns whether the Fourth Amendment requires suppression of evidence obtained when a police officer makes an arrest based on probable cause, but violates state law in making the arrest. When confronted with this situation, the overwhelming majority of the States and federal Circuits have held that a failure to follow state law in making an arrest does not require suppression. In other words, a violation of a state statute does not implicate the United States Constitution. However, a minority of courts, including the Supreme Court of Virginia in the decision below, have held that when an officer arrests with probable cause but violates state law, the Fourth Amendment requires suppression of evidence seized incident to that arrest. Put another way, they hold a violation of a state statute triggers suppression under the United States Constitution.

This Petition presents an ideal vehicle for this Court to resolve a deep and mature conflict among the lower courts concerning a recurring issue. Certiorari should be granted.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006). It is reprinted in the Appendix at 1. The *en banc* decision of the Court of Appeals of Virginia is published. *See Moore v. Commonwealth*, 622 S.E.2d 253 (Va. App. 2006) (*en banc*). It is reprinted in the Appendix at 12. Finally, the panel decision of the Court of Appeals of Virginia is also published as *Moore v. Commonwealth*, 609 S.E.2d 74 (Va. App. 2005). That decision can be found in the Appendix at 35.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The Fourth Amendment of the Constitution of the United States, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *Virginia Code* § 19.2-74 provides, in pertinent part:

> A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.
>
> Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT OF THE CASE

1. Two police detectives stopped David Lee Moore after they observed him driving on a suspended license in Portsmouth, Virginia. *App.* 1. Under state law, driving on a suspended license is a Class 1 misdemeanor, which carries a maximum punishment of one year in jail and a $2,500 fine. *Virginia Code* §§ 18.2-11, 18.2-272. Moore was arrested and, shortly thereafter, was searched incident to the arrest. The search yielded 16 grams of crack cocaine and $516 in cash. Moore was charged with possession of cocaine with the intent to distribute. Prior to his trial, his attorney filed a motion to suppress, alleging, among other things, that his rights under the United States Constitution were violated. *App.* 2.

2. At the suppression hearing, Moore conceded that the traffic stop itself was proper, but argued that under Virginia law he should have been released on a summons rather than being subjected to a full custodial arrest. Moore contended that, because he should not have been arrested under Virginia law, any evidence derived from the search incident to arrest should have been suppressed. The trial court denied the motion, holding that the search did not violate the United States Constitution or any Virginia law governing misdemeanor arrests. *App.* 2. Moore was convicted and sentenced to serve five years in prison, with one year and six months of that sentence suspended. *App.* 2.

3. Moore appealed to Virginia's intermediate appellate court. A divided three-judge panel reversed. The panel majority observed that under *Virginia Code* § 19.2-74, the officers should have issued a summons for the misdemeanor offense instead of effecting a full custodial arrest.

Since state law precluded a custodial arrest and required the issuance of a summons, the search incident to the arrest was improper. *App.* 38-39. The panel observed that, although *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (violation of seat belt law did not preclude full custodial arrest) and *Knowles v. Iowa*, 525 U.S. 113 (1998) (where traffic citation issued, doctrine of search incident to arrest did not apply because interests that justified search incident to arrest were not present) did not compel this outcome, suppression was "a logical and necessary extension of the decision in *Knowles*." *App.* 44. A dissenting judge, however, reasoned that "[b]ecause Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution." *App.* 49. The dissent further concluded that "it is clear that the Fourth Amendment to the United States Constitution is not violated as a result of a state law violation." *App.* 49.

4. Virginia obtained a rehearing *en banc* by the intermediate appellate court. By a vote of 7-4, the *en banc* court affirmed the conviction. The *en banc* court concluded that the constitutional legitimacy of an arrest under the National Constitution hinged on whether the officers had probable cause. *App.* 20. Moore's arrest was unquestionably based on probable cause. *App.* 20-21. The court reasoned that the presence of probable cause is an issue that must be "determined separate and apart from whether an arrest violates a state statute." *App.* 22. Finally, the *en banc* court held that the suppression of the evidence was unwarranted, since the Fourth Amendment did not compel suppression for the mere violation of a state statute. *App.*

25-26. The dissenting judges reiterated the reasoning set forth in the panel decision. *App.* 27-34.

5. Moore appealed to the Supreme Court of Virginia, arguing that "the Court of Appeals [of Virginia] *en banc* erred in holding that his 'arrest and search did not violate the Fourth Amendment.'" *App.* 3. That tribunal, by unanimous opinion, held that the search of the defendant, based upon a constitutionally unassailable arrest, nevertheless "was not consistent with the Fourth Amendment." *App.* 11. The Supreme Court of Virginia began by examining this Court's decisions in *Knowles* and *Atwater* as well as *Lovelace v. Virginia*, 522 S.E.2d 856 (Va. 1999), a decision interpreting the United States Constitution. The Virginia Supreme Court observed that *Virginia Code* § 19.2-74, unlike the statutory provision at issue in *Atwater*, did not authorize the officers to make a custodial arrest of Moore. *App.* 7. After analyzing the cases, the lower court concluded that

> the officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment.

App. 11. In other words, the Supreme Court of Virginia held that the Fourth Amendment compelled suppression of the evidence because of the violation of a state statute. This Petition follows.

REASONS FOR GRANTING THE PETITION

"In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004) (citing *United States v. Watson*, 423 U.S. 411, 417-424 (1976) and *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949)). Once there is probable cause to arrest and an arrest has occurred, the defendant can constitutionally be searched incident to that arrest. *United States v. Robinson*, 414 U.S. 218 (1973). Officers may arrest even for a "very minor criminal offense." *Atwater*, 532 U.S. at 354. In other words, officers act reasonably under the United States Constitution if they arrest upon probable cause. This standard rests on the text of the Fourth Amendment, historical practice and the jurisprudence of this Court.

Supplementing the probable cause standard, States have enacted a wide range of procedural statutes that govern the authority of police officers to arrest. A number of States have enacted statutes similar to *Virginia Code* § 19.2-74. *See Iowa Code* § 805.16 (mandating release on a summons for certain offenses); *Ohio Rev. Code* § 2935.26 (same); *Kentucky Rev. Stat.* § 431.015 (same); *Nebraska Rev. Stat.* § 29-435 (same); *New Mexico Stat.* § 66-8-123 (same). It is also common for some States to restrict the authority of certain types of investigators to make arrests. *See, e.g., Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998) (discussing restricted authority of liquor control investigators). Most States set territorial limits for an officer's authority to arrest. *See, e.g., Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (addressing whether evidence seized by police outside the territorial limit of their authority

should be suppressed); *Maine v. Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (same); *Michigan v. Hamilton*, 638 N.W.2d 92, 97-98 (Mich. 2002) (same). Finally, States have enacted a wide variety of procedural requirements that govern arrests. *See, e.g.*, *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (addressing whether violation of state procedural statute that afforded defendant an opportunity to appear and contest the arrest warrant requires suppression).

Because the Fourth Amendment to the United States Constitution imposes one standard for arrests and state law frequently provides for additional strictures, it is not unusual for state and federal courts to be confronted with the situation where a police officer has probable cause to arrest as required by the Fourth Amendment, but violates a state law governing arrests. At issue here is whether the Fourth Amendment requires the suppression of evidence when that occurs. The Virginia Supreme Court held that it does, and is joined by the Ninth Circuit in that conclusion. Five federal courts of appeals and four state supreme courts have reached the directly opposite conclusion. Certiorari is warranted to resolve this conflict over a recurring and important issue of constitutional law.

I. THE VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH NUMEROUS DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS.

The Fourth, Fifth, Sixth, Eighth and Tenth Circuits, as well as highest state courts in California, Massachusetts, North Carolina and Ohio, have concluded that the Fourth Amendment does not require the suppression of evidence seized incident to an arrest founded upon probable

cause when the arrest was conducted in violation of a state statute governing arrests.

Federal Cases:

- *United States v. Van Metre*, 150 F.3d 339, 347 (4th Cir. 1998) (confessions were admissible even though the arrest violated Tennessee law, which required police to obtain a fugitive of justice warrant; at the time of the arrest the officers had three valid warrants);

- *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (arrest for operating a bicycle without a headlight violated Iowa law but not the United States Constitution because it was based on probable cause);

- *United States v. Wright*, 16 F.3d 1429, 1437 (6th Cir. 1994) (stricter requirements of Tennessee law for warrantless arrests irrelevant where officers had probable cause; therefore, suppression of drug evidence seized from defendant's rental car not required);

- *United States v. Walker,* 960 F.2d 409, 415-17 (5th Cir. 1992) (methamphetamine need not be suppressed if officers had probable cause to arrest; whether arrest violates Texas law irrelevant for purposes of constitutional analysis);

- *United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (under state law, officers should not have arrested defendant for a misdemeanor that did not occur in the officers' presence; however, since arrest was founded upon probable cause, suppression of sawed-off shotgun was not required).

Federal courts have reached similar results in the strongly analogous context of certain actions under 42 U.S.C. § 1983. In each case, the court rejected the plaintiff's argument that an arrest that was improper under state law rendered the arrest unconstitutional under the Fourth Amendment. *See Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Cir. 2002) (arrest for misdemeanor assault that did not occur in officer's presence violated state law but not federal law; § 1983 lawsuit was dismissed because "[t]here is no federal right not to be arrested in violation of state law."); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (§ 1983 relief unwarranted because officers acted with probable cause; Puerto Rico rule of court prohibiting arrest for misdemeanors that do not occur in the officer's presence did not affect constitutional standard); *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (fact that defendant was entitled to a hearing under Illinois law to challenge his removal as a trespasser was irrelevant; officers did not face § 1983 liability when their arrest was made with probable cause); *Anderson v. Haas*, 341 F.2d 497, 498-99 (3rd Cir. 1965) (in civil rights action, district court erroneously concluded that validity of officer's arrest hinged on state law).

State Cases:

- *California v. McKay*, 41 P.3d 59, 65-72 (Cal. 2002) (defendant's arrest for riding a bicycle in the wrong direction on a residential street violated state law, but because arrest was based on probable cause it did not violate the United States Constitution);

- *Droste*, 697 N.E.2d at 623 (liquor control officers lacked statutory authority to arrest in this specific situation but suppression was unwarranted because officers had probable cause to arrest);

- *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (defendant's arrest was improper under state law because he was not provided with notice to challenge misdemeanor complaint; however, suppression of witness's identification must be denied because the arrest was made with probable cause);

- *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973) (misdemeanor offense of driving under the influence did not occur in officer's presence and, therefore, violated state law; nevertheless, suppression was not warranted because the officer acted with probable cause and thereby satisfied the National Constitution).

The reasoning of these courts is exemplified by the decision in *Bell,* a case almost identical to the case at bar. In *Bell*, the defendant was arrested for riding a bicycle without a headlight. The search incident to arrest yielded cocaine. *Bell,* 54 F.3d at 503. The district court granted the defendant's motion to suppress, reasoning that the arrest contravened Iowa law. An Iowa statute required the issuance of a citation for such offenses, rather than a custodial arrest. *Id.* The Eighth Circuit reversed. The court reasoned that "states may impose rules for arrests, searches and seizures that are more restrictive than the Federal Constitution," but these "state law violations do not necessarily offend the Federal constitution." *Id.* at 504. In the context of arrests, the court observed that "an arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause." *Id.*

Therefore, the district court erred when it looked to a state statute in assessing the Constitutional validity of the defendant's arrest. *Id.*

The California Supreme Court reached the same conclusion in *McKay*. In *McKay*, the defendant was arrested for operating a bicycle in the wrong direction on a residential street. 41 P.3d at 63. The search incident to that arrest yielded a baggie of methamphetamine. *Id.* The defendant sought the suppression of this evidence, contending that it violated California law. *Id.* After an extensive analysis of this Court's decisions, the California Supreme Court concluded that this Court had never held that a violation of state law rendered an arrest illegal under the United States Constitution. *Id.* at 66-68. The Court further observed that "[c]onstitutionalizing the myriad of technical state procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules." *Id.* at 69. Finally, the Court noted the strong consensus of opinion from other courts that have examined this issue. *Id.* at 68-69.

In contrast, the Ninth Circuit and the court below have concluded that when an arrest violates state law, the Constitution requires suppression. In *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1992), the Ninth Circuit held that counterfeit currency obtained during a search incident to arrest must be suppressed because arrest for operating a business without a license was impermissible under California law. The court concluded that this Court's prior decisions, particularly *United States v. Di Re*, 332 U.S. 581 (1948) and *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979), compelled suppression of the evidence. The court acknowledged that its decision conflicted with that of

other circuits. *Id.* at 1387-88. The court nonetheless held that the violation of California law rendered the defendant's arrest "unreasonable, and thus unlawful, under the Fourth Amendment." In 2003, in *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 950 (9th Cir. 2003), the Ninth Circuit affirmed the ongoing validity of *Mota*.

The need to resolve this conflict among the lower courts is especially pressing because in Virginia and California there is a direct conflict between the States' highest courts and the federal courts of appeals with jurisdiction over those States. This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The practical difficulties and arbitrariness created by such conflicts are manifest. For example, when a California law enforcement officer has probable cause to arrest a suspect but violates a California statute in the process, whether the evidence seized incident to arrest is suppressed depends on which Sovereign prosecutes. If the United States prosecutes, the suspect can successfully argue that the evidence must be suppressed on constitutional grounds; if California prosecutes, the evidence would be admitted. *See Mota*, 982 F.2d at 1387; *McKay*, 41 P.3d 65-72.

The Ninth Circuit explicitly recognized this possibility in *United States v. Campos*, 105 Fed. Appx. 184 (9th Cir. 2004) (unpublished). While ordering evidence suppressed because the defendant's arrest for driving on a suspended license violated California law, the court of appeals acknowledged that, under the California Supreme Court's decision in *McKay*, the evidence would not have been

suppressed if the prosecution had been brought in state court. *Id.* In Virginia, the situation is the reverse. The evidence would be suppressed in state court under the decision below, but would be admitted in a federal prosecution. *See Van Metre*, 150 F.3d at 347.

This case provides the Court with an ideal vehicle through which to resolve this conflict among the lower courts. First, it was undisputed that the officers in this case had probable cause to conclude that respondent had committed a crime, and that the evidence at issue was seized incident to the arrest for that crime. Therefore, subtracting *Virginia Code* § 19.2-74 from the equation, the arrest would have been proper under settled federal law. Second, it is clear that the Virginia Supreme Court's decision below was based exclusively on federal law. *See App.* 11 ("the search of the defendant was not consistent with the Fourth Amendment"). Although the lower court discussed a state case, *Lovelace,* that case centered exclusively on the United States Constitution. Indeed, in *Lovelace*, the Court concluded that "the search of Lovelace violated his Fourth Amendment rights." *Lovelace*, 522 S.E.2d at 857. Finally, there is no benefit to allowing further development in the lower courts. Most of the federal courts of appeals and a number of States have already spoken on the issue; the conflict will not disappear.

II. THE DECISIONS OF THE VIRGINIA SUPREME COURT AND OF THE NINTH CIRCUIT ARE FUNDAMENTALLY FLAWED.

A. This Court Should Clarify that a Search Incident to Arrest is Valid Under the United States Constitution if the Arrest is Based on Probable Cause.

This Court has "never taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of custody was deemed unnecessary (as a matter of state law or otherwise)." 1 Wayne R. LaFave, *Search and Seizure*, § 1.5(b) (4th ed. 1996). It follows that, if the arrest is valid, the search incident to that arrest is also constitutionally valid, regardless of any additional strictures of state law. However, the lower court and the Ninth Circuit seem to believe that the Constitution requires both probable cause and a strict compliance with any applicable state laws.

This view conflicts with this Court's holdings in *Elkins v. United States*, 364 U.S. 206 (1960), and *California v. Greenwood*, 486 U.S. 35 (1988). In *Elkins*, the Court examined the admissibility of wiretap evidence obtained by state officers. 364 U.S. at 206-07. The Court concluded that, whether the officers who illegally seize evidence are state or federal officers, "the test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at 223-24. In *Greenwood*, this Court rejected the defendant's argument "that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law." 486 U.S.

at 43. This Court acknowledged that States could impose more stringent constraints on the police than those imposed by the United States Constitution, but noted that it "had never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.*

As the Sixth Circuit observed, "it would be incongruous to use state law to determine whether the exclusionary rule should apply to a search incident to arrest, but to use federal law to determine whether the exclusionary rule should apply to all other searches." *Wright*, 16 F.3d at 1436. Adopting the majority view on the issue presented in this case would thus preserve the consistency of this Court's Fourth Amendment jurisprudence.

Furthermore, the probable cause standard, unfettered by further state law requirements, has the virtue of simplicity and clarity. *Texas v. Brown,* 460 U.S. 730, 742 (1983) (noting that "probable cause is a flexible, commonsense standard."); *Brinegar,* 338 U.S. at 176 ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement.").

Constitutionalizing the myriad state rules governing arrests would needlessly inject another layer of complexity to the constitutional law of arrest. In contrast to the straightforward probable cause standard, the application of the holding below will be difficult to apply in practice. It will not always be clear under state misdemeanor summons statutes whether the crime at issue is a misdemeanor or a felony. For example, under Virginia law, theft

of an item worth more than $200 is a felony, *Virginia Code* § 18.2-95, for which an officer may effect a full custodial arrest. On the other hand, theft of an item valued at less than $200 is petit larceny, a Class 1 misdemeanor, *Virginia Code* § 18.2-96, for which a summons is presumptively required under state law. *Virginia Code* § 19.2-74. The value of an item may not be immediately apparent to the arresting officer. Or an officer may be mistaken about the scope of one of the exceptions to the misdemeanor summons rule and improperly arrest a suspect under state law. Finally, statutes linking the power to arrest to jurisdictional boundaries within a State often have their own complexities. *See, e.g.*, *Virginia Code* § 19.2-250 (officers' jurisdiction extends to one mile beyond their jurisdictional boundary, "except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town."). For investigations that cross state lines, officers would have to determine which State's law of arrest should govern.

In *Atwater*, this Court reiterated the value of the bright line rule governing arrests, noting that

> we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.

532 U.S. at 347. The probable cause standard also has the virtue of uniformity in all state and federal courts. It would be anomalous for the scope of National Constitutional protection to evolve with jurisdictional boundaries. There is also no reason why federal prosecutions should be made to depend on the fortuity of the arrest locale.

B. The Exclusionary Rule Should Not be Extended, as a Matter of Constitutional Law, to Vindicate State Statutes.

The court below and the Ninth Circuit appear to believe that the Constitution requires the exclusion of evidence whenever police officers make a mistake under a state law that governs arrests. In other words, those tribunals elevate a violation of state law into a constitutional violation which in turn triggers the suppression remedy.

This view of the exclusionary rule is mistaken. "[T]he exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law." *Walker*, 960 F.2d at 415. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). Absent the state statute at issue, Moore's arrest would have been proper under settled constitutional law. *Atwater*, 532 U.S. at 354-55. Moore conceded at trial that the traffic stop was proper and that he had a suspended license. The officers unquestionably had probable cause to arrest for the misdemeanor offense of driving on a suspended license. Requiring suppression under such circumstances would inappropriately expand the scope of the exclusionary rule beyond its doctrinal foundation of vindicating federal rather than State interests.

This Court recently noted that suppression of evidence should be a last resort, not a first impulse. *Hudson v. Michigan*, 126 S. Ct. 2159, 2613 (2006). Among other things, the exclusionary rule exacts "substantial social costs," including the release of dangerous criminals. *Id.* at 2163. Here, in addition to the habitual costs of the exclusionary rule, expanding the rule to vindicate state statutes that may never have contemplated exclusion would impose additional costs to the citizenry at large: such a rule would ultimately discourage state legislatures from enacting measures, such as *Virginia Code* § 19.2-74, that benefit the public at large. A state legislature may enact a statute as a guideline for law enforcement rather than with any intent to trigger the suppression of probative evidence. A State's imposition of a jurisdictional boundary on a police officer's arrest power, for example, is not likely to stem from a desire to assist criminals in avoiding prosecution by suppressing relevant evidence. More likely, the state legislature simply seeks to ensure amicable relations between neighboring jurisdictions.

States, consistent with our federal scheme of government, are free to impose additional strictures upon their officers. However, the interpretation and remedies for violating those strictures should be left to the States that created these measures. If a State wishes to require the suppression of evidence seized outside of an officer's jurisdictional boundary, it can so provide.[1] If a State

[1] The probable cause standard and other constitutional due process requirements provide substantial protection to the citizenry, regardless of additional protections found in state law. Furthermore, as this Court noted in *Atwater*, the Nation is not "confronting anything like an epidemic of unnecessary minor-offense arrests" owing, in part, to the "good sense" of law enforcement who have neither the desire nor the

(Continued on following page)

concludes that suppression is the appropriate remedy for an officer's failure to release a suspect on a summons, the State can so declare. *See Minnesota v. Martin*, 253 N.W.2d 404, 405-06 (Minn. 1977); *New Mexico v. Bricker*, 134 P.3d 800, 805-808 (N.M. App.), *cert. granted*, 136 P.3d 569 (N.M. 2006). A State may conclude that suppression is the appropriate remedy, that a civil lawsuit or an administrative proceeding is the proper remedy, or that no remedy is required. The State that drafted the statute should have the prerogative of assessing the gravity of the violation of its own law and the appropriateness of a particular remedy. The sledgehammer of suppression is not constitutionally compelled when officers violate a state law governing arrests.

Our Constitution recognizes the distinct sovereignty of State and federal governments. If "state law can transform constitutional police conduct into its opposite," it would "unravel our federal system, since treating a state law as a violation of the Constitution 'is to make the federal government the enforcer of state law.'" *McKay*, 41 P.3d at 65 (quoting *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988)).

Furthermore, it is difficult to see why suppression should automatically follow for a violation of state statutes when suppression is not automatically triggered by violations of federal statutes, treaties, or regulations. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2679-82 (2006) (suppression not an appropriate remedy for a violation of the Vienna Convention); *United States v. Donovan*, 429

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resources to make full custodial arrests in every possible instance. 532 U.S. at 353.

U.S. 413, 432 n.22 (1977) (denying exclusion for violation of wiretapping statute); *United States v. Caceres*, 440 U.S. 741, 755 (1979) (violation of I.R.S. eavesdropping regulation did not require suppression).

To be sure, the *application* of federal constitutional law standards intersects in a number of contexts with state law. For example, a particular act may constitute a crime in one State but not in another. Therefore, an officer who has probable cause to believe that a suspect has violated a particular statute may properly arrest in the State that has enacted the statute, but may not arrest in a State where that statute does not exist. State law operates as a factual backdrop to the application of the standard mandated by the United States Constitution. However, the probable cause standard itself is a creature of the United States Constitution rather than of state law. Another illustration of this phenomenon are the cases under *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, state law defines the crime, but the Due Process standard flows from the Constitution itself. That standard, derived independently of the underlying law, is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

C. The Virginia Supreme Court and the Ninth Circuit's Minority View Decisions are Fundamentally Flawed.

The Virginia Supreme Court and the Ninth Circuit incorrectly applied this Court's jurisprudence. The decision of the Virginia Supreme Court relied on this Court's decisions in *Atwater* and *Knowles*. However, those cases

did not resolve the question presented in this case. In *Atwater*, this Court held that a full custodial arrest for a seatbelt violation did not violate the United States Constitution. 532 U.S. at 354-55. While the Texas statute at issue authorized the officer to make a full custodial arrest, the decision did not turn on that fact. *Id.* at 354. Given the background of state law in *Atwater*, the issue presented in the case at bar was not present. Similarly, in *Knowles*, this Court held that the Constitution could not support a search incident to citation, because the concerns underlying the search incident to arrest – officer safety and the need to preserve evidence for trial – do not apply to a situation where the officer issued a citation. 525 U.S. at 118-19. In the case at bar, however, the officers were not issuing a citation; they made a full custodial arrest.

As noted above, the Ninth Circuit's decision in *Mota,* 982 F.2d at 1387-88, erroneously relied on *Di Re*, 332 U.S. 581 and *DeFillippo*, 443 U.S. 31. Neither decision, when examined carefully, lends support to the view that suppression is required if an officer arrests upon probable cause, but the arrest violates a state statute.

In *Di Re*, this Court reversed a federal conviction because it was based on evidence obtained in a warrantless arrest that was illegal under state law. Because "[n]o act of Congress lays down a general federal rule for arrest without warrant for federal offenses," this Court adopted as a governing rule "the law of the state where an arrest without warrant takes place determines it." *Id.* at 589. The Court drew from a federal statute, since amended, which provided that an arrest by judicial process for a federal offense must be made "agreeably to the usual mode of process against offenders in such State." *Id.* at 589-90. The Court reasoned that if federal statutory law

required compliance with state law for arrests *with a warrant*, federal courts should logically turn to state law to determine the validity of arrests *without a warrant*. *Id.* at 589-90. Since the arrest in *Di Re* was invalid under New York law, this Court held that the fruits of the search incident to arrest should be suppressed. *Id.* at 593-95.

First, as the text of *Di Re* shows, and as a number of courts have concluded, the decision was grounded not in the United States Constitution but on the supervisory power of this Court to exclude evidence under circumstances deemed improper but not unconstitutional. *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67. *See also* LaFave, *supra* at § 1.5 ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations'"). Second, as several appellate courts have recognized, the holding in *Di Re* is no longer valid in light of the Court's subsequent holdings in *Elkins*, 364 U.S. 206, and *Greenwood*, 486 U.S. 35. *See Wright*, 16 F.3d at 1434-36; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67.

DeFillippo is also inapposite. Although this Court ultimately held that even if an ordinance is later held unconstitutional, an officer can reasonably rely on it to make an arrest, 443 U.S. at 40, it nonetheless stated, "whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* This statement is unremarkable, inasmuch as state law "is relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." *Id.* In other words, probable cause is the constitutional standard, but state law defines the crime for which the officer must have probable cause. *Accord Ryan v. County of DuPage*, 45 F.3d

1090, 1093 (7th Cir. 1995). Moreover, the statement in *DeFillippo* is dicta, because the defendant did "not contend that the arrest was not authorized by Michigan law." *DeFillippo*, 443 U.S. at 36.

Ultimately, *Di Re* and *DeFillippo* are entirely consistent with the rule – adopted by most of the lower courts – that an arrest that is founded on probable cause but is otherwise problematic under state law does not violate the United States Constitution. However, certain statements from those cases can act as a snare for lower courts. This Petition affords the Court the opportunity to clarify its jurisprudence on this important, recurring issue.

The standard for the constitutional validity of an arrest should be whether the officer has probable cause to believe that a crime has been committed. "State law neither adds nor subtracts from these constitutional rules." *Gordon*, 29 F.3d at 300.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

February 1, 2007

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DAVID LEE MOORE

v.

COMMONWEALTH OF VIRGINIA

Record No. 052619.

Supreme Court of Virginia.

2006 Va. LEXIS 99

November 3, 2006, Decided

***JUDGES*:** Present: Hassell, C.J., Lacy, Keenan, Kinser, Lemons, and Agee, JJ., and Carrico, S.J. OPINION BY SENIOR JUSTICE HARRY L. CARRICO.

OPINION BY: HARRY L. CARRICO

OPINION: This appeal implicates Code § 19.2-74(A)(1). In pertinent part, this Code section provides that when a police officer detains a person for a Class 1 misdemeanor, the officer "shall . . . issue a summons . . . to appear at a time and place to be specified in such summons," and "[u]pon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody." The Code section also contains several exceptions allowing a warrantless arrest pursuant to Code § 19.2-82 "if any such person shall fail or refuse to discontinue the unlawful act" or "if any person is believed by the arresting officer to be likely to disregard a summons . . . or . . . cause harm to himself or to any other person."

On February 20, 2003, two City of Portsmouth detectives, responding to a radio message that a motorist was operating a motor vehicle on a suspended license, stopped a vehicle being driven by the defendant, David Lee Moore. The officers ascertained that Moore was in fact operating on a suspended license. Although the offense is a Class 1

misdemeanor, Code § 46.2-301(C), the officers did not issue Moore a summons but arrested him, handcuffed him, and placed him in a police vehicle. They gave him the *Miranda*[1] warnings and secured his signature on a consent to search his room at the hotel where he was staying. They then took him to the hotel room.

Because of a "miscommunication" between the officers, they did not search Moore at the time he was arrested. Upon reaching his hotel room, they searched his person and found approximately 16 grams of crack cocaine in his jacket pocket and $516.00 in cash in his pants pocket. He admitted the cocaine was his.

Moore was indicted for possession of cocaine with intent to distribute. Code § 18.2-248. He then moved to suppress all the evidence obtained in the search of his person,[2] asserting that the seizure of the evidence violated the provisions of the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

The trial court denied the motion to suppress. In a bench trial, the court convicted Moore of possession with intent to distribute cocaine and sentenced him to serve five years in the penitentiary, with one year and six months suspended.

Moore appealed his conviction to the Court of Appeals of Virginia. A divided panel of the court reversed Moore's

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] In the hearing on the motion to suppress, one of the arresting officers was asked why Moore was arrested rather than given a summons. The officer replied, that it was "[j]ust our prerogative, we chose to effect an arrest."

conviction, finding the search of Moore "in violation of the Fourth Amendment." *Moore v. Commonwealth,* 45 Va.App. 146, 155, 609 S.E.2d 74, 79 (2005). However, upon rehearing en banc, a majority affirmed the conviction, finding that Moore's arrest did not violate his Fourth Amendment rights. *Moore v. Commonwealth,* 47 Va.App. 55, 64, 622 S.E.2d 253, 258 (2005). We awarded Moore this appeal.

On appeal, Moore argues that Code § 19.2-74 requires that the police issue a summons to a person detained for a Class 1 misdemeanor and to forthwith release him from custody upon his promise to appear at a specified time and place, unless he is subject to one or more of the exceptions listed in the statute. Moore asserts that none of the exceptions apply in this case.[3] Moore says that "[w]hen a person is unlawfully detained, as [he] was when he was arrested rather than being given a citation, the fruits of the unlawful detention must be suppressed." Moore concludes that the Court of Appeals en banc erred in holding that his "arrest and search did not violate the Fourth Amendment."

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[3] The Court of Appeals found that "[b]ecause the record is devoid of any evidence to suggest Moore failed to discontinue the unlawful act, or that the facts could render a reasonable belief that Moore would fail to comply with the summons or cause harm to himself or others, . . . the arrest violated the express provisions of Code § 19.2-74." *Moore,* 47 Va.App. at 63, 622 S.E.2d at 257. The Commonwealth has not assigned cross-error to this finding. Accordingly, we will not consider the Commonwealth's argument that "[i]nasmuch as there was no one else to drive Moore's vehicle, the officers were within their statutory authority to arrest Moore; otherwise, he would have been unable to 'discontinue the unlawful act' of driving on a suspended license." *See Commonwealth v. Cary,* 271 Va. 87, 90 n.1, 623 S.E.2d 906, 907 n.1 (2006).

On the other hand, the Commonwealth argues that the search of Moore was valid. The Commonwealth maintains that "the police officers had probable cause to arrest Moore because he committed a misdemeanor in their presence," and the "search incident to an arrest . . . did not violate the Fourth Amendment."

In support of his position, Moore cites the decision of the Supreme Court of the United States in *Knowles v. Iowa,* 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), and this Court's decision in *Lovelace v. Commonwealth,* 258 Va. 588, 522 S.E.2d 856 (1999). In *Knowles,* an Iowa statute allowed a police officer to arrest a person for a traffic offense and immediately take him before a magistrate or to issue a citation in lieu of arrest. The statute further provided that the issuance of a citation in lieu of arrest "does not affect the officer's authority to conduct an otherwise lawful search." 525 U.S. at 115 (citing and quoting Iowa Code Ann. § 805.1(4)).

An Iowa policeman stopped Knowles for speeding and issued him a citation rather than arresting him. The officer then conducted a full search of the vehicle without either Knowles' consent or probable cause, found marijuana and a "pot pipe," and placed Knowles under arrest. Knowles moved to suppress the evidence. The trial court denied the motion and Knowles was found guilty. The Supreme Court of Iowa affirmed, upholding the constitutionality under a bright-line "search incident to citation" exception to the Fourth Amendment's warrant requirement. *Id.* at 115.

The Supreme Court of the United States reversed. Noting that the officer had issued Knowles a citation rather than arresting him, the Court stated that the "[t]he

question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car." The Court answered the question "no." *Id.* at 114.

The Court explained that in *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L. Ed. 2d 427 (1973), it had recognized a search incident to arrest exception to the Fourth Amendment, which allows a full field-type search of the person incident to a lawful custodial arrest. The Court noted that the exception was based upon "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles,* 525 U.S. at 116. However, the Court found that "neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case." *Id.* at 117.

The Court also said that while the concern for officer safety in a routine traffic stop "may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search." *Id.*

The Court also said that Iowa had not shown a need to discover and preserve evidence. *Id.* at 118. Although asked to do so, the Court declined to extend the bright-line search incident to arrest exception to the Fourth Amendment recognized in *Robinson* to include a search incident to citation, a situation, the Court concluded, "where the concern for officer safety is not present to the same extent

and the concern for destruction or loss of evidence is not present at all." *Id.* at 119.

The Commonwealth argues that *Knowles* is not dispositive because the defendant there was not arrested and the decision in *Knowles* "holds that a search incident to a citation cannot be as expansive under the Fourth Amendment as one incident to an arrest." We cannot find such a holding in *Knowles.* In any event, it is clear that what the Court actually held in *Knowles* was that the Fourth Amendment forbids expansion of the search incident to arrest exception to include a search incident to citation. *Id.* at 118-19.

The Commonwealth also argues that the Supreme Court's subsequent decision in *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001), is controlling rather than *Knowles* and supports its position that the officers had probable cause to arrest Moore because he committed a misdemeanor in their presence. In *Atwater,* a police officer observed that Gail Atwater was driving her pickup truck with her young son and daughter in the front seat, all without seat belts. This conduct was prohibited by a Texas statute providing for a fine of not less than $25.00 nor more than $50.00. *Id.* at 323-24.

The officer pulled Atwater over, handcuffed her, placed her in his squad car, and drove her to the local police station, where she was placed in a jail cell for about one hour, after which she was taken before a magistrate and released on bond. She ultimately pleaded no contest to the seat belt charges and paid a $50.00 fine. *Id.* at 324.

Atwater and her husband then filed an action in state court for damages against the officer, the City of Lago

Vista, and the City's chief of police, alleging that the defendants had violated Gail Atwater's Fourth Amendment rights. The action was removed to federal court. The Atwaters were unsuccessful in the lower courts, and the Supreme Court granted certiorari "to consider whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses." *Id.* at 326. The Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* at 354.

Atwater, however, provides little support for the Commonwealth's position in this case. The Texas statute "expressly authorizes 'any peace officer [to] arrest without warrant a person found committing a violation' of [the Texas] seatbelt laws, [Tex. Transp. Code Ann.] § 543.001, although it permits police to issue citations in lieu of arrest." *Id.* at 323. The authority to effect such an arrest is lacking from our § 19.2-74, the statute at issue in this case. Furthermore, *Atwater* only involved the legality of an arrest; it did not involve any question about a search incident to the arrest.

Lovelace v. Commonwealth, 258 Va. 588, 522 S.E.2d 856 (1999), the other case cited by Moore in support of his position, came to this Court upon remand from the Supreme Court of the United States. John David Lovelace had been convicted in the Circuit Court of Halifax County for possession of marijuana and possession with intent to distribute cocaine. He appealed, alleging that the trial court had erred in denying his motion to suppress evidence that was seized from him during a search of his person.

The Court of Appeals of Virginia affirmed the convictions. *Lovelace v. Commonwealth,* 27 Va.App. 575, 500 S.E.2d 267 (1998). This Court refused Lovelace's petition for appeal and his subsequent petition for rehearing. Thereafter, the Supreme Court of the United States granted Lovelace a writ of certiorari, vacated the judgment of this Court, and remanded the case to this Court for further consideration in light of its decision in *Knowles. Lovelace v. Virginia,* 526 U.S. 1108, 119 S.Ct. 1751, 143 L. Ed. 2d 784 (1999).

The *Lovelace* case implicated Code § 19.2-74(A)(2), which provides that "[w]henever any person is detained by . . . an arresting officer for a violation . . . of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence, . . . the arresting officer shall take the name and address of such person and issue a summons . . . [and] shall forthwith release him from custody."

About ten o'clock at night, two deputy sheriffs observed Lovelace and several other men standing with open bottles of beer in their hands on the parking lot of a store in an area described as an "'open air drug market.'" Lovelace had a green bottle up to his mouth and appeared to be drinking from it. The men were ordered to lie face down on the ground after the deputies saw a bottle fly through the air and strike a car but could not see who threw it, although it came from the area where Lovelace had been standing. 258 Va. at 591, 522 S.E.2d at 857.

One of the deputies, Mike Womack, then approached Lovelace, who was lying on the ground as directed, and asked Lovelace his name. Lovelace identified himself but remained silent when asked whether he had any guns or

drugs. Womack then performed a "patdown" of Lovelace and felt something like a bag in his pocket. The deputy did not know if it was a plastic bag or what but he felt some lumps and something "squooshy," and he reached into Lovelace's pocket and retrieved the bag. The officer then arrested Lovelace and charged him with possession of marijuana and possession with intent to distribute cocaine, but not with any alcohol-related offense. The substance in the bag was later tested and identified as crack cocaine. The test also identified some marijuana. *Id.* at 591-92, 522 S.E.2d at 857.

The Commonwealth argued in *Lovelace* that the officers had probable cause to arrest Lovelace for drinking an alcoholic beverage in public and thus could conduct a search incident to arrest. We disagreed, based on *Knowles,* and stated as follows:

> The encounter between Lovelace and the officers, while not involving a traffic offense, was nonetheless similar in nature and duration to a routine traffic stop. We reach this conclusion primarily because the initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of a summons was authorized under Code § 19.2-74(A)(2). Only if Lovelace had failed or refused to discontinue the unlawful act could the officer have effected a custodial arrest and taken the defendant before a magistrate. Code § 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed Womack

> to search him. After *Knowles,* an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.

Id. at 596, 522 S.E.2d at 860 (emphasis added). We concluded that "the search of Lovelace was not consistent with the Fourth Amendment," and we reversed and dismissed both of Lovelace's convictions. *Id.* at 597, 522 S.E.2d at 860.

The Commonwealth distinguishes *Lovelace* by saying that the police officer detained Lovelace to issue a citation and did not arrest him, give him the *Miranda* warnings, or inform him he was under arrest while, in Moore's case, he was placed under arrest and thus the officers "did not exceed their authority when they conducted the search" of Moore.

This is a distinction that makes no difference. While Lovelace was not actually arrested until after Officer Womack retrieved the "squooshy" bag from his pocket, Womack insisted in his testimony that, initially, he was "detaining the defendant because of the open containers of beer, the bottle-throwing incident, and the odor of alcohol that he noticed when speaking with Lovelace," *id.* at 592, 522 S.E.2d at 857, facts indicative of the Class 4 misdemeanor of drinking in public. Code § 4.1-308. It was the type of offense for which Womack was detaining Lovelace that triggered the operation of Code § 19.2-74 and permitted Womack to issue only a summons to Lovelace since none of the statute's exceptions were present. Because Womack was authorized to issue only a summons for the alcohol-related offense, he could not lawfully conduct a full field-type search incident to an arrest. *Lovelace,* 258 Va. at 596, 522 S.E.2d at 860.

The same conclusion applies to the case at bar. Our statement in *Lovelace* could have equally been written using Moore and his charged offense: "The fact that the officers could have issued only a summons for the [driving on suspended license] offense also negates the Commonwealth's argument that the existence of probable cause to charge [Moore] with [driving on suspended license] allowed [the officer] to search him." *Id.*

The officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles,* the officers could not lawfully conduct a full field-type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment. Accordingly, we will reverse the judgment of the Court of Appeals and dismiss the indictment against Moore.

Reversed and dismissed.

DAVID LEE MOORE v.
COMMONWEALTH OF VIRGINIA

Record No. 2648-03-1

COURT OF APPEALS OF VIRGINIA

47 Va. App. 55; 622 S.E.2d 253;
2005 Va. App. LEXIS 536

November 22, 2005, Decided

COUNSEL: S. Jane Chittom, Appellate Defender (Virginia Indigent Defense Commission, on brief), for appellant.

Susan L. Parrish, Assistant Attorney General (Judith Williams Jagdmann, Attorney General, on brief), for appellee.

JUDGES: Present: Chief Judge Fitzpatrick, Judges Benton, Elder, Bumgardner, Frank, Humphreys, Clements, Felton, Kelsey, McClanahan and Haley. OPINION BY JUDGE ROBERT J. HUMPHREYS. Elder, J., joined by Fitzpatrick, C.J., Benton and Frank, JJ., concurring, in part, and dissenting, in part.

OPINION BY: ROBERT J. HUMPHREYS

OPINION: OPINION BY JUDGE ROBERT J. HUMPHREYS

UPON REHEARING EN BANC

This matter comes before the Court on rehearing *en banc* from a divided panel opinion issued February 22, 2005. David Lee Moore ("Moore") argues on appeal that his conviction for possession of cocaine with intent to distribute should be reversed because the trial court erred in denying his motion to suppress. Moore reasons that,

because his underlying arrest for driving on a suspended license violated both Code § 19.2-74(A)(1) and the Fourth Amendment to the United States Constitution, the evidence uncovered during the search incident to that arrest must be suppressed. For the reasons that follow, we affirm his conviction.

I. Background

On appeal, we review the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the Commonwealth, the prevailing party below. *Garcia v. Commonwealth*, 40 Va. App. 184, 189, 578 S.E.2d 97, 99 (2003). So viewed, the evidence establishes the following.

On February 20, 2003, Detective B.J. Karpowski overheard a conversation on his police radio between Officers McAndrew and Anthony. The officers were discussing the fact that a man nicknamed "Chubs" was driving a car in the area. Drawing on his knowledge that a man nicknamed "Chubs" had just been released from a federal penitentiary and was driving on a suspended license, Karpowski radioed the other officers and told them to stop the vehicle driven by "Chubs."[1]

Officers Anthony and McAndrew responded to Karpowski's radio message and stopped Moore, whom Officer Anthony knew was nicknamed "Chubs." Although Moore was not the man Detective Karpowski referred to in his

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[1] Detective Karpowski had checked the driver's license of a man named "Chubs" the week before, and had determined he was driving on a suspended license. However, the man Karpowski knew to be nicknamed "Chubs" was a man named Christopher Delbridge, not David Moore.

radio message, Officer Anthony determined that Moore was, in fact, driving on a suspended license.

After confirming that Moore's license was suspended, Officer Anthony arrested Moore, handcuffed him, and advised him of his *Miranda* rights. Officer Anthony then asked Moore if he understood his rights, and Moore acknowledged that he did. Officer Anthony also asked Moore where he was staying and if he had any narcotics on his person. Moore voluntarily told Officer Anthony that he was staying in an Econo-Lodge in Chesapeake. Moore was then taken to Officer McAndrew's vehicle, where Moore signed a waiver of consent allowing the officers to search his hotel room.[2] Moore was then placed in Officer McAndrew's police car. However, due to a miscommunication, neither officer conducted a search incident to arrest at that time. In fact, Officer McAndrew was "under the impression that [Moore] had been searched prior to placing him in my police vehicle."

Once Moore was placed in the police car, the officers called animal control to pick up a dog that was riding in Moore's vehicle.[3] After animal control arrived forty-five minutes later, the officers drove to the hotel room where

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[2] Officer Anthony testified this all happened "approximately fifteen minutes after we had him stopped."

[3] The officers believed the dog was a pit bull, and it was "very upset with [the detectives' presence]" and "big enough" that the officers "did not want to get too close to it." The Commonwealth argues on brief that the dog's presence was a factor in the officers' determination that Moore would be unable to discontinue the unlawful act of driving on a suspended license. The Commonwealth's contention is without merit because Moore's arrest was in violation of Code § 19.2-74(A)(1), and it did not fall into any of the exceptions allowing the officers to effectuate such an arrest. *See* Part II(A), *infra*.

Moore had been staying. There, Officer McAndrew realized Moore had not been searched. The officers made a protective sweep of the hotel room, and Officer McAndrew then conducted a search of Moore incident to arrest. He recovered crack cocaine from Moore's jacket and $ 516 in cash from his pants pocket. Moore was then taken back to the City of Portsmouth.

Moore moved to suppress the evidence recovered from his person on statutory and constitutional grounds, arguing the search of his person was tainted by the illegal arrest that preceded it. Specifically, Moore argued the arrest was illegal because the detectives failed to release him on a summons pursuant to Code § 19.2-74(A)(1).

When asked at the suppression hearing why Moore was arrested, Officer Anthony stated, "just our prerogative, we chose to effect an arrest." Additionally, after the traffic stop, "narcotics were eventually recovered." When asked why Moore was not released on a summons, Anthony replied, "Well, we were still in the middle of an investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, . . . also conducting a narcotics investigation."

The trial court denied the motion to suppress, holding that the arrest neither violated the Fourth Amendment nor Virginia law permitting an officer to arrest for a misdemeanor committed in his presence. After hearing additional evidence, the trial court convicted Moore of possession of cocaine with intent to distribute, and sentenced him to five years in prison, with one year and six months suspended.

On appeal, a divided panel of this Court reversed the judgment of the trial court. *See* ***Moore v. Commonwealth*, 45 Va. App. 146, 609 S.E.2d 74 (2005)**. We granted the Commonwealth's petition for *en banc* review, stayed the mandate of the panel decision, and reinstated the appeal. Upon rehearing *en banc*, we affirm the judgment of the trial court and reinstate Moore's conviction.

II. Analysis

On appeal, "this Court is 'bound by the trial court's findings of historical fact unless "plainly wrong" or without evidence to support them and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers.'" *Davis v. Commonwealth*, 37 Va. App. 421, 429, 559 S.E.2d 374, 378 (2002) (quoting *Neal v. Commonwealth*, 27 Va. App. 233, 237, 498 S.E.2d 422, 424 (1998)). However, "whether a defendant is seized in violation of the Fourth Amendment is a question that is reviewed *de novo* on appeal." *Id.*

Moore argues on appeal that, because the initial arrest was unauthorized by Code § 19.2-74, it was also in violation of his Fourth Amendment rights. As such, Moore contends the fruits of the subsequent search, specifically, the cocaine recovered from his person, must be suppressed. In response, the Commonwealth argues that Moore's arrest did not violate Code § 19.2-74.[4] The Commonwealth reasons that, because Moore was the only one driving the car, and because he did not have a valid

[4] Neither Moore nor the Commonwealth disputes that there was a custodial arrest. The only contention is the validity of that arrest under both the Code of Virginia and the United States Constitution.

driver's license, Moore ultimately would "fail to discontinue the unlawful act."[5] The Commonwealth further contends that, even if the arrest was invalid, it nonetheless was constitutional and does not trigger the application of the Fourth Amendment exclusionary rule.

For the reasons that follow, we hold that, although the arrest violated the express provisions of Code § 19.2-74, the arrest and resulting search did not violate Moore's constitutional – as opposed to statutory – rights. And, because Code § 19.2-74 does not provide an exclusionary remedy, we must affirm the trial court's denial of Moore's motion to suppress.

A. The Application of Code § 19.2-74

Code § 19.2-74 provides, in pertinent part, that

> Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence . . . the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified

[5] In its brief, the Commonwealth did not address whether the officers had probable cause to arrest Moore, and Moore concedes the existence of probable cause that an offense under the laws of the Commonwealth was committed. The Commonwealth only argues that the officers did not violate the statute by arresting him. The Commonwealth contends the arrest was in accordance with one of the three exceptions as listed in the statute to the citation requirement.

> in such summons or notice. *Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody.*

Code § 19.2-74(A)(1) (emphasis added). The statute also sets forth several exceptions to this general rule, providing that an officer may effectuate a warrantless arrest, pursuant to Code § 19.2-82, if: (1) "any such person shall fail or refuse to discontinue the unlawful act," or (2) "if any person is believed by the arresting officer to be likely to disregard a summons . . . or . . . to be likely to cause harm to himself or to any other person. . . ." Code § 19.2-74(A)(1).

Accordingly, Code § 19.2-74, in conjunction with Code § 19.2-82, permits an officer to conduct a warrantless custodial arrest in two types of circumstances. First, an arrest is proper if the person fails or refuses to discontinue the unlawful act or refuses to give a written promise to appear. *Id.* Second, an arrest is also proper if the officer reasonably believes the person will likely disregard the summons or will likely do harm to himself or to others. *Id.*

In the first instance, the ability to arrest is based upon the offender's actual conduct, not potential future conduct. Thus, according to *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E.2d 856 (1999), only if Moore had "failed or refused to discontinue the unlawful act could the officers have effected a custodial arrest and taken the defendant before a magistrate." *Id.* at 596, 522 S.E.2d at 860. In this case, Moore complied with all of the officers' requests, including discontinuing the unlawful conduct when he stopped his vehicle. There is no evidence showing Moore failed or refused to discontinue the unlawful act.

Moreover, Moore did not refuse to give a written promise to appear, as a summons was never issued.

In the second instance, an arrest may be based on a "reasonable belief" about the offender's future conduct. However, "although the statute refers to predictive estimation of the accused person's future conduct, the standard for determining satisfaction of the statute is objective, whether evidence supports a reasonable belief that the statutory circumstances obtain." *Fox v. Commonwealth*, 43 Va. App. 446, 450, 598 S.E.2d 770, 771 (2004). In this case, there is no evidence that Moore would disregard the summons or would be likely to cause harm to himself or to others. Moore did not argue with the officers, nor did they have any reason from past experience to believe that he would not comply with the summons. *Cf. Smith v. Commonwealth*, 30 Va. App. 737, 742-43, 519 S.E.2d 831, 833 (1999) (holding officers could arrest the defendant for breach of the peace when she used profane language and kicked the officers while they attempted to obtain information about her identity).

Because the record is devoid of evidence to suggest Moore failed to discontinue the unlawful act, or that the facts could render a reasonable belief that Moore would fail to comply with the summons or cause harm to himself or others, we hold that the arrest violated the express provisions of Code § 19.2-74.

B. The Application of the Fourth Amendment to the Search

Moore also argues that, because the arrest violated Code § 19.2-74, the arrest and subsequent search also violated his Fourth Amendment rights. For the reasons

that follow, we find that neither the arrest nor the search violated Moore's constitutional rights.

1. The Constitutional Validity of the Arrest.

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001), the United States Supreme Court held that, when "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* at 354. "The standard of probable cause 'applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.'" *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)).

Here, the officers had probable cause to arrest Moore for committing a misdemeanor in their presence. Specifically, Officers Anthony and McAndrew detained Moore because they had reason to believe, based on radio information received from a fellow officer, that Moore was driving on a suspended license. Although the record indicates that the officers were mistaken about the identity of the "Chubs" referred to by Detective Karpowski, the Supreme Court has held that "when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971). Because the officers observed Moore, a. k. a. "Chubs," driving his vehicle on what they had reason to believe was a suspended license, the officers had probable cause to believe that Moore was committing a crime in

their presence. And, because the officers had probable cause that Moore committed a criminal offense, his arrest did not violate the Fourth Amendment. *See Atwater*, 532 U.S. at 354.

Moore argues, however, that *Atwater* does not apply in this case, claiming *Atwater* dealt with a Texas statute specifically authorizing an arrest for violation of that statute. Moore cites *West v. Commonwealth*, 36 Va. App. 237, 549 S.E.2d 605 (2001), to support this contention.[6] However, *West* is distinguishable because the search at issue in that case took place when the defendant was in the process of being released on a summons and thus was no longer under arrest such as would justify a search incident to arrest. Crucial to our analysis is the fact that the Supreme Court's holding in *Atwater* – that an arrest based on probable cause does not violate the Constitution – *was not* contingent upon the construction of the particular Texas statute. In fact, "had the court intended to condition the constitutionality of an arrest on state law, it had ample opportunity to say so. . . ." *People v. McKay*, 27

[6] In *West*, the trial court denied a motion to suppress the evidence obtained as a result of a search. *West*, 36 Va. App. at 238, 549 S.E.2d at 605. This Court reversed, finding the search was in violation of the defendant's Fourth Amendment rights. *Id.* The officer, operating under "the preference for the issuance of a summons," began to write a summons for failing to signal a turn. *Id.* at 241, 549 S.E.2d at 607. The officer then noticed a bulge in defendant's shoe, searched him, retrieved cocaine, and arrested him. *Id.* At the time of the search, defendant had been placed under "arrest" for the sole purpose of writing a citation. Before spotting the bulge in the defendant's shoe, the officer had decided to issue the summons rather than arrest defendant because he had no "indication [defendant] would not appear or that he was a threat to himself or others." *Id.* This Court found the officer conducted a search incident to a citation, which violates the Fourth Amendment. *See Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998).

Cal. 4th 601, 117 Cal. Rptr. 2d 236, 41 P.3d 59, 68 (Cal. 2002).[7] Moreover, the "'Supreme Court has *never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of [a suspect into] custody was deemed unnecessary (as a matter of state law or otherwise).'" *Id.* at 66 n.4 (quoting 1 LaFave, Search and Seizure § 1.5(b), p. 141 (3d ed. 1996)) (emphasis in original).

Moore also contends the officers did not have probable cause to arrest him "because there can be no probable cause to arrest where arrest is contrary to the controlling statute." For the reasons identified above, the issue of probable cause is determined separate and apart from whether an arrest violates a state statute. Accordingly, because the officers had probable cause to arrest Moore for committing a misdemeanor in their presence, the arrest – although unauthorized by Code § 19.2-74 – did not violate the Fourth Amendment.

2. The Constitutional Validity of the Search.

In *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the United States Supreme Court held that a search incident to an arrest that is based upon probable cause complies with the Fourth Amendment

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[7] The *Atwater* Court rejected the argument that there should be a new rule of constitutional law forbidding custodial arrest, even on probable cause, for minor offenses which ultimately carry no jail time and for which the government can show no compelling need for immediate detention. *Atwater*, 532 U.S. at 345-50. In order to address the concerns that may arise when officers arrest for minor crimes or misdemeanors, the *Atwater* Court recognizes that many jurisdictions have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for such offenses. *Id.* at 352.

and, thus, "requires no additional justification." *Id.* at 235. As noted by the *Robinson* Court,

> the authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id.; *see also New York v. Belton*, 453 U.S. 454, 461, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Because, as discussed above, Moore's arrest was based upon probable cause, the search incident to that arrest did not violate the Fourth Amendment. Moore argues, however, that, because the initial arrest was "unlawful," *Robinson* does not apply. Moore reasons that the Virginia Supreme Court's decision in *Lovelace* mandates a finding that the search subsequent to the arrest violated his Fourth Amendment rights. We disagree.

In *Lovelace*, a police officer detained the defendant for a misdemeanor and searched him. The officer "did not actually arrest [the defendant] until after he retrieved the [drugs] from the defendant's pocket." *Lovelace*, 258 Va. at 592, 522 S.E.2d at 857. Applying Code § 19.2-74 and the

Knowles holding – specifically, that a search conducted incident to a citation violates the Fourth Amendment – the Supreme Court of Virginia held an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.[8]

Moore's reliance upon *Lovelace*, however, is without merit. Although *Lovelace* may, at first glance, seem to be dispositive of the issue before this Court, further analysis indicates otherwise. In determining that the search was a violation of the defendant's Fourth Amendment rights, the Supreme Court of Virginia held that the citation requirement negated the Commonwealth's argument that probable cause to arrest justified the search. *Id.* at 595, 522 S.E.2d at 860. The *Lovelace* Court stated that the bright-line rule regarding a search incident to arrest, as set forth in *Robinson*, did not apply because the detention contemplated in *Lovelace* was similar in nature and duration to a traffic stop. In other words, in *Lovelace*, the officers did not intend to arrest the defendant at the onset of the encounter. Rather, the detention was similar to a stop and frisk,

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[8] The Supreme Court of Virginia also recognized that Code § 19.2-74(A)(2) did not contemplate a custodial situation equivalent to an actual custodial arrest. *Lovelace*, 258 Va. at 596, 522 S.E.2d at 858; *see also Rhodes v. Commonwealth*, 29 Va. App. 641, 513 S.E.2d 904 (1999) (applying *Knowles*). However, in this case, the officers *did* effectuate a custodial arrest in violation of the statute. This presents two problems. First, the Supreme Court of the United States has never addressed this particular situation and determined that an arrest in violation of a state law is also a violation of the federal Constitution. Second, the legislature did not contemplate this situation, where Moore suggests that "an officer . . . turns a citation offense into an arrest offense, and thereby insulates the search from judicial review." However, if the legislature did consider this particular circumstance, they decided not to provide the remedy of excluding evidence obtained after that arrest.

and the defendant was arrested only after an illegal pat down revealed a bag of crack cocaine. The officer admitted that he retrieved the bag from the defendant's pocket even though "the object . . . did not feel like a gun, he did not know what was in the bag, and [] he did not have a search warrant." *Id.* at 591, 522 S.E.2d at 857.

In contrast, the facts of this case indicate the officers intended to effect a custodial arrest from the time they detained Moore. They placed him under arrest, read him his *Miranda* rights, and obtained a written consent to search his hotel, all within fifteen minutes of the initial stop. Thus, *Lovelace* is not controlling, and the bright-line rule announced in *Robinson* applies. That is, because the arrest was based on probable cause, and because the search was conducted incidental to that arrest, the search did not violate the Fourth Amendment.[9]

C. The Application of the Exclusionary Rule.

Lastly, Moore argues that exclusion of the evidence should be the remedy for the cocaine seized during the

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[9] The dissent would hold that *Knowles* controls the outcome of this appeal, correctly noting that *Knowles* prohibits a search incident to a citation. However, the reasoning of the dissent fails to consider the underlying rationale for the United States Supreme Court's decision in *Knowles*. When read against its decision in *Robinson*, as noted above, *Knowles* simply stands for the proposition that the constitutional rationale justifying a search incident to arrest evaporates when a suspect is either no longer under arrest, as was the case in *Knowles*, or never under arrest, as was the case in *Lovelace*. Neither is the case here. However statutorily infirm Moore's custody status was, probable cause unquestionably existed that Moore had committed a criminal offense under the laws of the Commonwealth. We thus reiterate that, on these facts, *Robinson* and *Atwater* control the outcome of this appeal.

search subsequent to the unlawful arrest. The Commonwealth argues that the exclusion of evidence is not a proper remedy unless the statute so provides. For the reasons that follow, we hold that, even though the arrest violated Code § 19.2-74, the exclusionary rule does not apply.

As we stated in *Troncoso v. Commonwealth*, 12 Va. App. 942, 407 S.E.2d 349, 8 Va. Law Rep. 294 (1991), "historically, searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression unless the statute supplies that right." *Id.* at 944, 407 S.E.2d at 350 (citing *Commonwealth v. Brown*, 8 Va. App. 41, 44, 378 S.E.2d 623, 624, 5 Va. Law Rep. 2091 (1989) (Baker, J., concurring)); *see also Horne v. Commonwealth*, 230 Va. 512, 518-19, 339 S.E.2d 186, 191 (1986); *Hart v. Commonwealth*, 221 Va. 283, 287 n.*, 269 S.E.2d 806, 809 n.* (1980). The Supreme Court of Virginia "has steadfastly refused to extend [the rule set forth in *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914),] to encompass evidence seized pursuant to statutory violations, absent an express statutory provision for suppression.[10] *Troncoso*, 12 Va. App. at 944, 407 S.E.2d at 350; see also *Hall v. Commonwealth*, 138 Va. 727, 733-34, 121 S.E. 154, 156 (1924); *Thompson v. Commonwealth*, 10 Va. App. 117, 122, 390 S.E.2d 198, 201, 6 Va. Law Rep. 1178 (1990).

[10] In *Weeks*, the Supreme Court held that evidence obtained in violation of constitutional proscriptions against unreasonable searches and seizures may not be used against the accused. This rule was also made applicable to the states through *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961).

In the present case, the arrest did not violate Moore's Fourth Amendment rights, which would have triggered the exclusionary rule. Rather, the arrest violated a state statute that does not provide for the exclusion of evidence retrieved from a search subsequent to that arrest. Because the statute does not provide the exclusionary remedy, we may not supply one judicially. Accordingly, we hold that no exclusionary rule applies, and, thus, the trial court did not err in denying Moore's motion to suppress.

III. Conclusion

For the foregoing reasons, we uphold the trial court's denial of the motion to suppress and affirm Moore's conviction for possession of cocaine with intent to distribute.

Affirmed.

CONCUR BY: Elder (In Part)

DISSENT BY: Elder (In Part)

DISSENT:

Elder, J., joined by Fitzpatrick, C.J., Benton and Frank, JJ., concurring, in part, and dissenting, in part.

I join in the majority's recitation of the facts and its conclusion in Part II.A. that David Lee Moore's arrest violated the express provisions of Code § 19.2-74. However, I disagree with the majority's conclusion that this statutory violation did not rise to a constitutional violation under the facts of this case. I would hold that the decision in *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), compels the conclusion that the search incident to the unlawful custodial arrest was

unreasonable under the Fourth Amendment. Thus, I would reverse and dismiss the indictment, and I respectfully dissent from the judgment.

As the United States Supreme Court explained in *Knowles*, the Fourth Amendment places limitations on searches conducted incident to issuance of a citation. In *Knowles*, an Iowa police officer stopped Knowles for speeding and, as permitted by statute, exercised his discretion to issue Knowles a citation rather than arrest him. *Id.* at 114, 119 S. Ct. at 486. After issuing the citation, the officer conducted a full search of Knowles's car, found a bag of marijuana and a "pot pipe" under the driver's seat, and arrested Knowles for offenses related to his possession of that contraband. *Id.* The Supreme Court considered whether conducting a full search of Knowles's vehicle pursuant to the issuance of a traffic citation was consistent with the Fourth Amendment and concluded that it was not. *Id.*

According to the Supreme Court, "two historical rationales [exist] for the 'search incident to arrest' exception [to the Fourth Amendment]: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Id.* at 116, 119 S. Ct. at 487. It "recognized that 'the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.'" *Id.* at 117, 119 S. Ct. at 488 (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5, 94 S. Ct. 467, 476 n.5, 38 L. Ed. 2d 427 (1973)). The Court determined in *Knowles* that neither rationale was present and refused to extend the "search-incident-to-arrest" exception to permit searches incident to the issuance of citations. *Id.* at 118-19, 119 S. Ct. at 488. The Court held

that "officers have other, independent bases to search for weapons and protect themselves from danger," including the ability to "perform a 'patdown' of [the detainee] upon reasonable suspicion that [he] may be armed and dangerous." *Id.* at 117-18, 119 S. Ct. at 488 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

The Virginia Supreme Court addressed a similar issue in *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E.2d 856 (1999). Lovelace and several other men were drinking beer while standing in the parking lot of a convenience store known to be an "open air drug market." *Id.* at 591, 522 S.E.2d at 857. Officers in the area saw a beer bottle fly through the air but did not see who threw it. *Id.* One officer testified that the bottle came from the area where Lovelace was standing. *Id.* Lovelace and the other men were ordered to lie face down on the ground. *Id.* An officer approached Lovelace and asked him his name. *Id.* Lovelace identified himself but remained silent when the officer asked him whether he had any drugs or guns. *Id.* The officer proceeded to "pat down" Lovelace. *Id.* In Lovelace's pocket, he felt something like a plastic bag with lumps in it, but he did not know what was in the bag. *Id.* at 591-92, 522 S.E.2d at 857. The officer nevertheless reached in Lovelace's pocket and retrieved the bag. *Id.* at 592, 522 S.E.2d at 857. The substance was later identified as crack cocaine. *Id.*

In reversing Lovelace's conviction, the Court said:

> *Knowles* is applicable. . . . The initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of a summons was authorized under Code § 19.2-74(A)(2). Only if Lovelace had failed or refused to discontinue the unlawful act could the officer

> have effected a custodial arrest and taken the defendant before a magistrate. Code § 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him. After *Knowles*, an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.
>
> Nor do we believe that Code § 19.2-74(A)(2) contemplates a custodial situation equivalent to an actual custodial arrest. Under that statute, a suspect is detained, or in the custody of the police officer, only long enough for the officer to take down the name and address of the person and issue a summons. One of the reasons that the *Knowles* Court did not extend the *Robinson* "bright-line rule" to a "search incident to citation" was because the duration of the encounter between a police officer and a defendant is "relatively brief" when the officer issues a citation. Thus, the threat to officer safety is less.

Id. at 596, 522 S.E.2d at 860; *see also West v. Commonwealth*, 36 Va. App. 237, 549 S.E.2d 605 (2001); *Rhodes v. Commonwealth*, 29 Va. App. 641, 513 S.E.2d 904 (1999) (en banc).

The United States Supreme Court subsequently revisited *Knowles*, holding in *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557, 149 L. Ed. 2d 549 (2001), that an officer effecting a custodial arrest for a

misdemeanor traffic offense may search the arrestee without violating the Fourth Amendment. However, we noted in *West* that the Court in *Atwater* reached this conclusion in the context of a state statute that expressly authorized a custodial arrest in such circumstances and gave the officer the discretion to issue a summons in lieu of effecting an arrest. *West*, 36 Va. App. at 242 n.2, 549 S.E.2d at 607 n.2. Because the statute at issue in *Atwater* was significantly different from Virginia's, we held in *West* that the ruling in *Atwater* "does not apply in this case." *Id.* We then applied *Knowles* to hold unconstitutional the search of West conducted while he was handcuffed and under arrest for a citation-only offense. *Id.* at 240-42, 549 S.E.2d at 606-07. Thus, we concluded in *West* that the holding in *Atwater* had no effect on the holding of *Knowles* that an officer who conducts a search pursuant to issuance of a summons violates the Fourth Amendment. *See id.*

The majority's holding here, in essence, overrules the interpretation of *Atwater* we made in *West*. Of course, the Court sitting *en banc* has the authority to overrule a panel decision, but I believe its legal basis for doing so is constitutionally unsound because *Atwater* did not address the impact of the Fourth Amendment on a search incident to a custodial arrest for a misdemeanor offense effected in violation of a state statute authorizing only the issuance of a summons.

Here, rather than searching pursuant to issuance of a summons – a clear violation of the Fourth Amendment – as in *Knowles* and *West*, the detectives effected a full custodial arrest of Moore and searched him pursuant to that arrest. We all agree that arrest violated Code § 19.2-74 but disagree as to the ramifications of that violation. I agree with the majority that, ordinarily, a statutory

violation does not require the suppression of evidence obtained as a result of that violation "'absent an express statutory provision for suppression.'" *Janis v. Commonwealth*, 22 Va. App. 646, 651, 472 S.E.2d 649, 652 (quoting *Troncoso v. Commonwealth*, 12 Va. App. 942, 944, 407 S.E.2d 349, 350, 8 Va. Law Rep. 294 (1991)), *aff'd on reh'g en banc*, 23 Va. App. 696, 24 Va. App. 207, 479 S.E.2d 534 (1996). However, in light of the Supreme Court's declaration in *Knowles* that the Fourth Amendment does not permit a search incident to issuance of a citation, I would conclude that a search conducted pursuant to a custodial arrest that violates Code § 19.2-74 constitutes, in effect, a search incident to issuance of a citation in violation of the Fourth Amendment. *Knowles* holds that if an officer, exercising his discretion as permitted by statute, chooses only to issue a citation rather than to effect a full arrest, a search incident to issuance of that citation is unconstitutional. I see no reason to reach a different result when it is the legislature that has concluded that, absent additional facts, only a citation should be issued for a particular offense.[11]

Although *Knowles* did not expressly address this scenario, neither *Knowles* nor *Atwater* precludes this approach, and I would hold that exclusion, under the facts of Moore's case, is a logical and necessary extension of the decision in *Knowles*. The Virginia Supreme Court intimated as much in *Lovelace* when it observed "The fact that the officers could have issued only a summons for the alcohol-related offense [under the relevant state statute]

[11] The Court recognized in *Atwater* that "it is . . . easier to devise a minor-offense limitation by statute than to derive one through the Constitution. . . ." 532 U.S. at 352, 121 S. Ct. at 1556.

also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him." 258 Va. at 596, 522 S.E.2d at 860. Where a statute authorizes only the issuance of a citation for certain minor offenses, pursuant to which a full search would be unconstitutional under *Knowles*, to hold admissible the fruits of a search, conducted by an officer who effects a full custodial arrest under circumstances clearly not permitted by statute, would yield undesirable results and would be fraught with the potential for abuse. Any officer so desiring could intentionally effect a full custodial arrest contrary to clearly established state law in order to avoid running afoul of *Knowles*, thereby placing the search beyond the reach of the Fourth Amendment's exclusionary rule. *Cf. Crosby v. Commonwealth*, 6 Va. App. 193, 200-01 367 S.E.2d 730, 4 Va. Law Rep. 2341 & n.9, 6 Va. App. 193, 367 S.E.2d 730, 735, 4 Va. Law Rep. 2341 & n.9 (1988) (holding existence of probable cause and exigent circumstances may justify warrantless entry of residence so long as police are "not . . . responsible for creating their own exigencies").

Under appropriate circumstances, the good faith exception to the exclusionary rule permits the admission of evidence obtained by an officer mistaken about the law. *See, e.g., United States v. Gould*, 326 F.3d 651, 659-60 (5th Cir. 2003). However, the burden rests on the government to prove good faith. *See, e.g., United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001). Here, the Commonwealth made no argument that the arresting officers misperceived the law. Further,

> the exception is not devised for the unlawful conduct of *all* officers who mean well. The good faith

> belief must be grounded in *objective* reasonableness. The mistake of an operative fact or an error of technical nature may not bar admission of evidence.
>
> [Circumstances are different where the mistake is] on a basic point of established law. To extend the exception so far as to allow evidence of a clearly unlawful warrantless search ... would put too great a premium on ignorance of the law and would virtually terminate the exclusionary rule.

United States v. Whaley, 781 F.2d 417, 421 (5th Cir. 1986) (citations omitted) (emphases added). When Detectives Anthony and McAndrew encountered Moore on February 20, 2003, both the relevant provisions of Code § 19.2-74 and the Supreme Court's 1998 holding in *Knowles* were established law, and the detectives' misapplication of that law was not objectively reasonable.

Applying these principles to the facts of this case, I would hold the search was unconstitutional because the Code made clear that, absent additional facts, the detectives were required to issue Moore a summons for the misdemeanor offense of driving on a suspended license. *See* Code § 19.2-74; Code § 46.2-301 (providing that driving while one's license is suspended is a Class 1 misdemeanor). Moore's arrest violated Code § 19.2-74, and the evidence obtained as a result of the search, which was, in effect, conducted pursuant to issuance of a citation, should have been suppressed pursuant to *Knowles* as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963). For these reasons, I would reverse and dismiss the indictment, and I respectfully dissent.

DAVID LEE MOORE v. COMMONWEALTH OF VIRGINIA

Record No. 2648-03-1

COURT OF APPEALS OF VIRGINIA

45 Va. App. 146; 609 S.E.2d 74; 2005 Va. App. LEXIS 80

February 22, 2005, Decided

COUNSEL: S. Jane Chittom, Appellate Defender (Virginia Indigent Defense Commission, on briefs), for appellant.

Susan L. Parrish, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

JUDGES: Present: Chief Judge Fitzpatrick, Judge Elder and Senior Judge Annunziata.* OPINION BY JUDGE LARRY G. ELDER, Annunziata, J., dissenting.

OPINION BY: LARRY G. ELDER

OPINION: David Lee Moore (appellant) appeals his conviction under Code § 18.2-248 for possession of cocaine with intent to distribute. Appellant argues on appeal that his conviction should be reversed because the trial court erred in denying his motion to suppress. Appellant's motion to suppress was based on the failure of police to issue a summons instead of effecting an arrest, pursuant to Code § 19.2-74(A)(1), when they stopped his car and determined he was driving on a suspended license. For the following reasons, we reverse.

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* Judge Annunziata participated in the hearing and decision of this case prior to the effective date of her retirement on December 31, 2004 and thereafter by her designation as a senior judge pursuant to Code § 17.1-401.

I.

BACKGROUND

On appeal, we review the evidence, and all reasonable inferences that can be drawn from the evidence, in a light most favorable to the Commonwealth as the party prevailing below. *Garcia v. Commonwealth,* 40 Va. App. 184, 189, 578 S.E. 2d 97, 99 (2003). So viewed, the evidence establishes that on February 20, 2003, Detective B.J. Karpowski overheard a conversation on his police radio about a man, whose nickname was "Chubs," driving a car in the area. Drawing on his knowledge that a man nicknamed Chubs had just been released from a federal penitentiary and was driving on a suspended license, Karpowski radioed other officers and told them to stop Chubs.

Detectives Mark Anthony and T. McAndrew responded to Karpowski's radio message and stopped appellant, whom Anthony knew was nicknamed "Chubs." Although appellant was not the man Karpowski referred to in his radio message, the detectives determined that he was driving on a suspended license.

Appellant was alone in the car with a dog the detectives described as "very upset with [the detectives' presence]" and "big enough" that the officers "didn't want to get too close to it." After confirming that appellant's license was suspended, Detectives Anthony and McAndrew arrested appellant, handcuffed him, and placed him in Detective McAndrew's vehicle. Due to a miscommunication, the detectives did not search appellant at that time. The detectives then called animal control and requested that they pick up the dog. Forty-five minutes later, after animal control arrived, the detectives drove to a hotel room where appellant had been staying. There, McAndrews

searched appellant's person and recovered crack cocaine from his jacket and $516 in cash from his pants pocket.

When asked at the hearing why appellant was arrested, Detective Anthony stated, "Just our prerogative, we chose to effect an arrest. Additionally, subsequent to that traffic stop, narcotics were eventually recovered." When asked why they did not release appellant on a summons, Anthony replied, "Well, we were still in the middle of the investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, . . . also conducting a narcotics investigation."

Appellant moved to suppress on statutory and constitutional grounds, arguing the search of his person was tainted by the illegal arrest that preceded it. The arrest was illegal, he argued, because the detectives failed to release him on a summons pursuant to Code § 19.2-74(A)(1). The trial court denied the motion to suppress. Citing *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001), the trial court held the arrest violated neither the Fourth Amendment nor Virginia law permitting an officer to arrest for a misdemeanor committed in his presence. After hearing additional evidence, the trial court convicted appellant and sentenced him to five years in prison, one year and six months suspended. This appeal followed.

II.

ANALYSIS

Code § 19.2-74 provides, in pertinent part:

A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed

in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

Driving while one's license is suspended is a Class 1 misdemeanor. Code § 46.2-301(C). Therefore, in the instant case, Code § 19.2-74 required the detectives to issue appellant a summons and release him from custody upon securing his promise to appear unless: (1) appellant's offense was drunk driving under Code § 18.2-266 or a specifically exempted offense under Title 46.2, (2) appellant failed or refused to discontinue the unlawful act, (3)

the detectives believed appellant was likely to disregard the summons, or (4) the detectives reasonably believed appellant was likely to cause harm to himself or to another person. Code § 19.2-74; *see also West v. Commonwealth,* 36 Va. App. 237, 240-42, 549 S.E. 2d 605, 606-07 (2001). Absent proof of facts supporting application of one of these exceptions, a full custodial arrest, necessary to justify a search of the individual incident to arrest, was not permitted under the statute.

As the United States Supreme Court explained in *Knowles v. Iowa,* 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), upon which appellant relies, the Fourth Amendment also places limitations on searches conducted incident to issuance of a citation. In *Knowles,* 525 U.S. at 114, 119 S. Ct. at 486, an Iowa police officer stopped Knowles for speeding and, as permitted by statute, exercised his discretion to issue Knowles a citation rather than arrest him. After issuing the citation, the officer conducted a full search of Knowles's car, found a bag of marijuana and a "pot pipe" under the driver's seat, and arrested Knowles for offenses related to his possession of that contraband. *Id.* The Supreme Court considered whether conducting a full search of Knowles's vehicle pursuant to the issuance of a traffic citation was consistent with the Fourth Amendment and concluded that it was not. *Id.*

According to the Supreme Court, "two historical rationales [exist] for the 'search incident to arrest' exception [to the Fourth Amendment]: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Id.* at 116, 119 S. Ct. at 487. The Court determined in *Knowles* that neither rationale was present and refused to extend the

"search-incident-to-arrest" exception to permit searches incident to the issuance of citations. *Id.* at 118-19, 119 S. Ct. at 488. The Court held that "officers have other, independent bases to search for weapons and protect themselves from danger," including the ability to "perform a 'patdown' of [the detainee] upon reasonable suspicion that [he] may be armed and dangerous." *Id.* at 117-18, 119 S. Ct. at 488 (citing *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

The Virginia Supreme Court addressed a similar issue in *Lovelace v. Commonwealth,* 258 Va. 588, 522 S.E. 2d 856 (1999). Lovelace and several other men were drinking beer while standing in the parking lot of a convenience store known to be an "open air drug market." *Id.* at 591, 522 S.E. 2d at 857. Officers in the area saw a beer bottle fly through the air but did not see who threw it. *Id.* One officer testified that the bottle came from the area where Lovelace was standing. *Id.* Lovelace and the other men were ordered to lie face down on the ground. *Id.* An officer approached Lovelace and asked him his name. *Id.* Lovelace identified himself but remained silent when the officer asked him whether he had any drugs or guns. *Id.* The officer proceeded to "pat down" Lovelace. *Id.* In Lovelace's pocket, he felt something like a plastic bag with lumps in it, but he did not know what was in the bag. *Id.* at 591-92, 522 S.E. 2d at 857. The officer nevertheless reached in Lovelace's pocket and retrieved the bag. *Id.* at 592, 522 S.E. 2d at 857. The substance was later identified as crack cocaine. *Id.*

In reversing Lovelace's conviction, the Court said:

> *Knowles* is applicable. . . . The initial reason for detaining Lovelace was his alleged commission of a Class 4 misdemeanor for which the issuance of

> a summons was authorized under Code § 19.2-74(A)(2). Only if Lovelace had failed or refused to discontinue the unlawful act could the officer have effected a custodial arrest and taken the defendant before a magistrate. Code § 19.2-74(A)(2). However, there is no evidence in the record that Lovelace acted in such a manner. The fact that the officers could have issued only a summons for the alcohol-related offense also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him. After *Knowles,* an "arrest" that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search.
>
> Nor do we believe that Code § 19.2-74(A)(2) contemplates a custodial situation equivalent to an actual custodial arrest. Under that statute, a suspect is detained, or in the custody of the police officer, only long enough for the officer to take down the name and address of the person and issue a summons. One of the reasons that the *Knowles* Court did not extend the *Robinson* "bright-line rule" to a "search incident to citation" was because the duration of the encounter between a police officer and a defendant is "relatively brief" when the officer issues a citation. Thus, the threat to officer safety is less.

Id. at 596, 522 S.E. 2d at 860; *see also West,* 36 Va. App. 237, 549 S.E. 2d 605; *Rhodes v. Commonwealth,* 29 Va. App. 641, 513 S.E. 2d 904 (1999) (*en banc*).

The United States Supreme Court subsequently revisited *Knowles,* holding in *Atwater,* 532 U.S. at 354, 121

S. Ct. at 1557, that an officer effecting a custodial arrest for a misdemeanor traffic offense may search the arrestee without violating the Fourth Amendment. However, we noted in *West* that the Court reached this conclusion in the context of a state statute that expressly authorized a custodial arrest in such circumstances and gave the officer the discretion to issue a summons in lieu of effecting an arrest. *West,* 36 Va. App. at 242 n. 2, 549 S.E. 2d at 607 n. 2. Because the statute at issue in *Atwater* was significantly different from Virginia's, we held in *West* that the ruling in *Atwater* "does not apply in this case." *Id.* We then applied *Knowles* to hold unconstitutional the search of West conducted while he was handcuffed and under arrest for a citation-only offense. *Id.* at 240-42, 549 S.E. 2d at 606-07. Thus, we concluded in *West* that the holding in *Atwater* had no effect on the holding of *Knowles* that an officer who conducts a search pursuant to issuance of a summons violates the Fourth Amendment. *See id. Atwater* did not address the impact of the Fourth Amendment on a search incident to a custodial arrest for a misdemeanor offense effected in violation of a state statute authorizing only the issuance of a summons.

Here, rather than searching pursuant to issuance of a summons as in *Knowles,* the detectives arrested appellant and searched him incident to that arrest. Appellant contends that arrest violated Code § 19.2-74 and the United States and Virginia Constitutions and, thus, that the fruits of the accompanying search must be suppressed. Ordinarily, a statutory violation does not require the suppression of evidence obtained as a result of that violation "'absent an express statutory provision for suppression.'" *Janis v. Commonwealth,* 22 Va. App. 646, 651, 472 S.E. 2d 649, 652 (quoting *Troncoso v. Commonwealth,* 12

Va. App. 942, 944, 407 S.E. 2d 349, 350, 8 Va. Law Rep. 294 (1991)), *aff'd on reh'g en banc,* 23 Va. App. 696, 24 Va. App. 207, 479 S.E. 2d 534 (1996). However, in light of the Supreme Court's declaration in *Knowles* that the Fourth Amendment does not permit a search incident to issuance of a citation, we now conclude that a search conducted pursuant to a custodial arrest that violates Code § 19.2-74 constitutes, in effect, a search incident to issuance of a citation in violation of the Fourth Amendment.[1] *Knowles* holds that if an officer, exercising his discretion as permitted by statute, chooses only to issue a citation rather than to effect a full arrest, a search incident to issuance of that citation is unconstitutional. We see no reason to reach a different result when it is the legislature that has

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[1] The Virginia Supreme Court's recent language in an order affirming this Court's judgment in *Hunt v. Commonwealth,* 42 Va. App. 537, 592 S.E. 2d 789 (2004) (*en banc*) (affirmed without opinion by an evenly divided court), neither compels nor supports a different result. *Hunt v. Commonwealth,* No. 040614 (Va. Oct. 8, 2004). The Supreme Court held that Hunt did not preserve for appeal his claim that the search at issue violated his constitutional rights and affirmed based *solely* on his statutory claims:

> [Defendant's argument] was inadequate to preserve the *constitutional* issue for appeal.
>
> The Court also concludes that the Court of Appeals did not err in affirming the circuit court's rejection of the defendant's *statutory* arguments in support of his motion to suppress. Assuming, without deciding, that a violation of Code § 19.2-74 occurred, the defendant failed to establish that he was entitled to suppression of the evidence obtained as a result of the search. In the absence of a violation of a defendant's constitutional rights, the remedy of exclusion of evidence is not available for a statutory violation.

Hunt, slip op. at 1-2 (citation omitted) (emphasis added). Thus, the Supreme Court's order in *Hunt* actually supports our conclusion that a statutory violation rising to the level of a constitutional violation requires suppression.

concluded that, absent additional facts, only a citation should be issued for a particular offense.

Although *Knowles* did not expressly address this scenario, neither *Knowles* nor *Atwater* precludes this approach, and we hold that exclusion, under the facts of appellant's case, is a logical and necessary extension of the decision in *Knowles.* The Virginia Supreme Court intimated as much in *Lovelace* when it observed "The fact that the officers could have issued only a summons for the alcohol-related offense [under the relevant state statute] also negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [Deputy] Womack to search him." 258 Va. at 596, 522 S.E. 2d at 860. Where a statute authorizes only the issuance of a citation for certain minor offenses, pursuant to which a full search would be unconstitutional under *Knowles,* to hold admissible the fruits of a search, conducted by an officer who effects a full custodial arrest under circumstances clearly not permitted by statute, would yield inconsistent results and would be fraught with the potential for abuse. Any officer so desiring could intentionally effect a full custodial arrest contrary to clearly established state law in order to avoid running afoul of *Knowles,* thereby placing the search beyond the power of the court to review. *Cf. Crosby v. Commonwealth,* 6 Va. App. 193, 200-01 & n. 9, 367 S.E. 2d 730, 735 & n. 9, 4 Va. Law Rep. 2341 (1988) (holding existence of probable cause and exigent circumstances may justify warrantless entry of residence so long as police are "not . . . responsible for creating their own exigencies").

We recognize that, under appropriate circumstances, the good faith exception to the exclusionary rule permits the admission of evidence obtained by an officer mistaken

about the law. *See, e.g., United States v. Gould,* 326 F.3d 651, 659-60 (5th Cir. 2003). However, the burden rests on the government to prove good faith. *See, e.g., United States v. Brunette,* 256 F.3d 14, 17 (1st Cir. 2001). Here, the Commonwealth made no argument that the arresting officers misperceived the law. Further,

> the exception is not devised for the unlawful conduct of *all* officers who mean well. The good faith belief must be grounded in *objective* reasonableness. The mistake of an operative fact or an error of technical nature may not bar admission of evidence. [Circumstances are different where the mistake is] on a basic point of established law. To extend the exception so far as to allow evidence of a clearly unlawful warrantless search . . . would put too great a premium on ignorance of the law and would virtually terminate the exclusionary rule.

United States v. Whaley, 781 F.2d 417, 421 (5th Cir. 1986) (citations omitted) (emphases added). When Detectives Anthony and McAndrew encountered appellant on February 20, 2003, both the relevant provisions of Code § 19.2-74 and the Supreme Court's 1998 holding in *Knowles* were established law, and their misapplication of that law was not objectively reasonable.

Applying these principles to the facts of this case, we hold the search was unconstitutional because the Code made clear that, absent additional facts, the detectives were required to issue appellant a summons for the misdemeanor offense of driving on a suspended license. *See* Code § 19.2-74; Code § 46.2-301 (providing that driving while one's license is suspended is a Class 1 misdemeanor). The Commonwealth argues only that the police

had "reason to believe that the unlawful activity would not cease had they released [appellant] on a summons" because appellant was alone in the car with an animal "that could not be easily contained" and because "no one was available to take [appellant] or his dog from the scene." The Commonwealth thus argues that Code § 19.2-74 permits an arrest when the officers had "reason to believe that the unlawful activity would not cease had they released [appellant] on a summons." The Commonwealth, however, misapprehends the appropriate question under the statute. The trial court must determine whether the facts establish that appellant failed or refused to discontinue the unlawful act; whether the police had reason *to believe* appellant would fail or refuse to discontinue the unlawful act is immaterial. *Cf. Fox v. Commonwealth,* 43 Va. App. 446, 449-50, 598 S.E. 2d 770, 771 (2004) (discussing the standard to be applied in evaluating the applicability of exceptions (3) and (4)). That appellant was alone in the car with his dog and no one else was present to transport him from the scene do not establish that he failed or refused to discontinue the unlawful activity. No other evidence bearing on the question was introduced, and the trial court made no finding that appellant attempted to drive his car again after the initial stop.[2] *See Lovelace,* 258 Va. at 596, 522 S.E. 2d at 860 ("Only if Lovelace had failed or refused to discontinue the unlawful act could the officer

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[2] The trial court denied the motion to suppress on the ground that the United States Supreme Court's decision in *Atwater* permits police officers to make an arrest for a misdemeanor traffic offense committed in their presence. However, as discussed *supra* in the text, we have held that *Atwater* is inapplicable to a case such as the instant one because Code § 19.2-74 does not provide the officer with discretion to make an arrest, as did the statute at issue in *Atwater. See West,* 36 Va. App. at 242 n. 2, 549 S.E. 2d at 607 n. 2.

have effected a custodial arrest and taken the defendant before a magistrate. However, there is no evidence in the record that Lovelace acted in such a manner." (citation omitted)).

We dealt with similar facts in *West*. In that case, a police officer observed West execute a turn in his car without using a signal. *West,* 36 Va. App. at 238, 549 S.E. 2d at 605. West subsequently parked his car, at which time the officer approached and asked to see West's license. *Id.* West informed him that he did not have a license, and the officer confirmed he was not licensed to drive. *Id.* He then handcuffed West, told him he was under arrest "for driving without a license," and began filling out a summons. *Id.* While filling out the summons, the officer noticed a bulge in West's shoe. *Id.* The officer searched the shoe and recovered crack cocaine. *Id.* We held that the cocaine should have been suppressed because the officer did not have authority to conduct the search where the evidence failed to establish that one of the exceptions to Code § 19.2-74 applied. *Id.* at 242, 549 S.E. 2d at 607. Specifically addressing the failure of the evidence to establish the applicability of the second exception, we stated that West "stopped the car before [the officer] approached him, and [the officer] had already started the paperwork to have the car towed. Therefore, [West] ceased the unlawful behavior." *Id.* at 240, 549 S.E. 2d at 606. Because West had ceased the unlawful behavior and because there was no evidence that he had failed or "refused to discontinue his unlawful acts," we held that the second exception did not apply and that his detention was illegal. *Id.* at 242, 549 S.E. 2d at 607.

Here, appellant ceased the unlawful activity of driving on a suspended license when the detectives stopped him,

and no evidence was introduced establishing that he failed or refused to discontinue the unlawful act. We conclude that the evidence in the instant case fails to establish the applicability of an exception to Code § 19.2-74(A)(1). Accordingly, appellant's arrest violated Code § 19.2-74, under which only issuance of a citation was authorized, and the evidence obtained as a result of the search, which was, in effect, conducted pursuant to issuance of a citation, should have been suppressed as fruit of the poisonous tree. *See Wong Sun v. United States,* 371 U.S. 471, 485-86, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). For the foregoing reasons, we reverse and dismiss the indictment.

Reversed and dismissed.

DISSENT BY: Annunziata

DISSENT:

Annunziata, J., dissenting.

I agree with the majority that Moore was arrested in violation of Code § 19.2-74. However, I cannot concur in the judgment to reverse. I would hold that, because Moore was placed under full custodial arrest supported by probable cause to believe a criminal offense was committed, Moore's arrest did not violate the United States Constitution. The exclusionary rule therefore does not apply, and Moore's conviction should be affirmed.

The evidence in this case establishes beyond dispute that Moore was placed under a full custodial arrest supported by probable cause that a criminal offense had been committed. After stopping Moore in his vehicle, an officer on the scene determined that Moore's driving license was suspended. Thus, the police had probable cause to believe that Moore was driving on a suspended license, a misdemeanor

violation of Code § 46.2-301(C). Moore was subsequently placed in handcuffs, made to wait forty-five minutes by his car until animal control arrived, and then transported to his hotel room.

I.

Because Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 149 L. Ed. 2d 549, 121 S. Ct. 1536 (2001) (holding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, *without violating the Fourth Amendment,* arrest the offender" (emphasis added)); *see also Penn v. Commonwealth,* 13 Va. App. 399, 407, 412 S.E. 2d 189, 194, 8 Va. Law Rep. 1518 (1991) (holding that "probable cause is the standard for testing the constitutional validity of an arrest").

Furthermore, it is clear that the Fourth Amendment to the United States Constitution is not violated as a result of a state law violation. The principle that state law is not relevant to a determination of whether the Fourth Amendment is violated, and thus whether the concomitant exclusionary rule is implicated, is firmly rooted in jurisprudence. *See California v. Greenwood,* 486 U.S. 35, 43, 100 L. Ed. 2d 30, 108 S. Ct. 1625 (1988) (holding that evidence obtained in violation of California law should not have been excluded under the Fourth Amendment because the Court has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth

Amendment depends on the law of the particular State in which the search occurs"); *see also Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Cir. 2002) (holding that "there is no federal right not to be arrested in violation of state law"); *United States v. Van Metre,* 150 F.3d 339, 347 (4th Cir. 1998) (holding that whether the arrest was "conducted in accordance with Tennessee state law is irrelevant to our analysis" of whether to suppress the evidence pursuant to the federal exclusionary rule); *United States v. Bell,* 54 F.3d 502, 504 (8th Cir. 1995) (holding the lower court erred by looking to state law to determine that the arrest was invalid, and thus excluding the evidence, because "[a]n arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause"); *United States v. Wright,* 16 F.3d 1429, 1437 (6th Cir. 1994) (holding that "the fact that the arrest, search, or seizure may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended . . . because the exclusionary rule is only concerned with deterring Constitutional violations"); *United States v. Walker,* 960 F.2d 409, 415 (5th Cir. 1992) (holding that "whether the Fourth Amendment has been violated is determined *solely* by looking to federal law on the subject" (emphasis added)); *Anderson v. Haas,* 341 F.2d 497, 499 (3d Cir. 1965) (evaluating civil rights claim and holding that whether an arrest violates the federal constitution requires reference to federal law and that it is "immaterial whether [the police officer's] conduct is legal or illegal as a matter of state law" (internal quotations omitted)); *Horne v. Commonwealth,* 230 Va. 512, 519, 339 S.E. 2d 186, 191 (1986); *Penn,* 13 Va. App. at 406, 412 S.E. 2d at 194.

Moreover, this Court has held that exclusion is not an appropriate remedy when a state statute is violated " 'absent an express statutory provision for suppression.' " *Janis v. Commonwealth,* 22 Va. App. 646, 651, 472 S.E. 2d 649, 652 (quoting *Troncoso v. Commonwealth,* 12 Va. App. 942, 944, 407 S.E. 2d 349, 350, 8 Va. Law Rep. 294 (1991)), *aff'd on reh'g en banc,* 23 Va. App. 696, 24 Va. App. 207, 479 S.E. 2d 534 (1996).[3] Code § 19.2-74 does not direct that evidence obtained in violation of its provisions must be suppressed. I would therefore find that the exclusion of evidence in this case is without legal support.

---

[3] Virginia has historically looked to the General Assembly to adopt legislative measures as a means of protecting constitutional rights under both the federal and state constitutions. *See, e.g., Hall v. Commonwealth,* 138 Va. 727, 733-34, 121 S.E. 154, 155-56 (1924); *Janis,* 22 Va. App. at 651, 472 S.E. 2d at 652. In *Hunt v. Commonwealth,* No. 040614, slip. op. at 1 (Va. Oct. 8, 2004), discussed *infra* in Part II, the Supreme Court apparently did not have the occasion to consider the policy implications of this legal principle and adopt a construction that gives import to the legislative purpose of the statue. *See Bazemore v. Commonwealth,* 42 Va. App. 203, 226, 590 S.E. 2d 602, 613 (2004). Among the more ostensible and troubling policy issues engendered by violations of Code § 19.2-74, and which inhere in finding that evidence seized in violation of state law may nonetheless be used to convict, are the absence of a remedy for such violations and the effective nullification of the statute's mandate. It is not difficult to see that, in the absence of an exclusionary rule, an officer desiring to conduct a search could effect a custodial arrest in clear violation of state law and place the fruits of that search beyond review. Such a result divests Code § 19.2-74 of import and effectiveness, creates a positive incentive for police to disregard the legislative mandate of Code § 19.2-74, and gives little effect to the legislature's "expressed . . . preference for the issuance of a summons in lieu of an arrest warrant for most misdemeanor cases by enacting Code § 19.2-74." *West v. Commonwealth,* 36 Va. App. 237, 239, 549 S.E. 2d 605, 605 (2001).

II.

That Moore was arrested based on probable cause is not a factor in the majority's calculus. Instead, the majority concludes that Moore was, "in effect," searched incident to a citation because Code § 19.2-74 does not permit a full custodial arrest. It cites *Knowles v. Iowa,* 525 U.S. 113, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998), in support of the fiction it creates and does so in order to avail itself of the *Knowles* holding. In *Knowles,* a case originating in Iowa, a state statute gave the police the discretionary authority to either arrest or issue a citation for the minor traffic violation of speeding. *Id.* at 115. The Supreme Court held that a search conducted incident to the issuance of a citation violates the United States Constitution. *Id.* at 114. The majority in this case concludes that, because Code § 19.2-74 does not authorize an arrest and limits police discretion to the issuance of a summons, the search in this case can only be denominated as incident to the issuance of a citation, in which case the *Knowles* holding would require exclusion of the seized evidence. I cannot concur in this reasoning.

It is undeniable that the Supreme Court in *Knowles* noted the Iowa statutory provision permitting a police officer to issue a citation for speeding rather than effecting an arrest. *Id.* at 115. However, the majority places undue reliance on this factual distinction because the statutory authority to arrest had no bearing whatsoever on the decision. *See id.* at 114. The Supreme Court confined itself to determining "whether [a search incident to a citation] authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car," *id.,* and the question was answered in the negative. *Id.* ("We answer this question 'no.'"). A careful reading of *Knowles*

discloses not a single reference to the discretionary authority granted to the Iowa police force to arrest as a reason for the Supreme Court's conclusions. Rather, the critical fact for the Supreme Court was that the defendant *was not arrested* and, because the defendant was not arrested, that the "historic rationales" underlying the search incident to arrest exception were not present. *Id.* at 116-17 ("The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a *custodial arrest.*" (Emphasis added)). The Supreme Court's reasoning makes abundantly clear that the search incident to arrest exception applies *only* when an actual arrest takes place because *only* then are the historic rationales underlying the exception present. This reading of *Knowles* comports not only with the language of the opinion itself but also with prior Supreme Court precedent. *See, e.g., United States v. Robinson,* 414 U.S. 218, 235, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) ("It is the *fact* of the lawful arrest which establishes the authority to search . . . ." (emphasis added)). On the other hand, the majority's reading of *Knowles* requires the conclusion that the decision signified, *sub silentio,* a sea change in federal law.[4] *Cf. supra* Part I.

In the present case, we must address a question not addressed in *Knowles.* The facts establish that an arrest occurred, not that a citation was issued. The question formulated by those facts is whether an arrest that occurs in violation of state law also violates the Fourth Amendment to the United States Constitution, triggering the exclusionary rule.

---

[4] It has been six years since *Knowles* was decided, and no subsequent case has invested the *Knowles* holding with the meaning suggested by the majority.

We answered this question in the negative in *Penn*. In *Penn*, this Court considered whether to exclude evidence obtained by a police officer incident to an arrest that violated Code § 19.2-81, a statute granting police the authority to arrest for misdemeanors only when committed in their presence. *Penn*, 13 Va. App. at 401, 412 S.E. 2d at 190. We determined that the police officer's arrest of the defendant violated Code § 19.2-81 because the crime did not take place in the police officer's presence. *Id.* at 402, 412 S.E. 2d at 190. We affirmed the conviction, however, reasoning that, although the arresting police officer was not in the presence of the defendant when the crime was committed, the officer had probable cause to believe that a crime had been committed because he was informed of the crime by another police officer. *Id.* at 408, 412 S.E. 2d at 194. Because the officer had probable cause to believe the defendant committed a crime, we held that his arrest did not violate the Fourth Amendment and that the evidence obtained incident to the arrest could not be suppressed. *Id.*

Although this case arose under a different statute, Code § 19.2-74 rather than Code § 19.2-81, I perceive no principled distinction than can be made which would compel a result different from that reached in *Penn*. Indeed, nothing in Virginia case law interpreting Code § 19.2-74 requires a different result. To the extent the majority relies on Virginia cases to reach a different result, the reliance is misplaced; none of the cases cited involved a full custodial arrest of the defendant in violation of Code § 19.2-74, the circumstances presented here. In *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E. 2d 856 (1999), the defendant was not placed under custodial arrest. *Id.* at 592, 522 S.E. 2d at 857. The Court thus rejected "the Commonwealth's argument that the existence of probable

cause to charge Lovelace with drinking an alcoholic beverage in public allowed Womack to search him."[5] *Id.* at 596, 522 S.E. 2d at 860. In *West v. Commonwealth,* 36 Va. App. 237, 549 S.E. 2d 605 (2001), a search conducted immediately after the officer was "filling out the summonses" and before an arrest could be effected was not justified by the search incident to arrest exception. *Id.* at 240-42, 549 S.E. 2d at 606-07. Finally, in *Rhodes v. Commonwealth,* 29 Va. App. 641, 513 S.E. 2d 904 (1999) (*en banc*), we held that the search incident to arrest exception could not apply where the defendant was searched during a "non-custodial detention." *Id.* at 645, 513 S.E. 2d at 906.[6]

Because Moore's arrest was based on probable cause, I am compelled to conclude that his Fourth Amendment rights were not violated. In the absence of a violation of Moore's Fourth Amendment rights, the federal exclusionary rule cannot apply, and neither the statute nor Virginia

---

[5] In rejecting the Commonwealth's argument, the Supreme Court implicitly rejected the reasoning of our panel decision in *Lovelace,* which held that "[t]he Constitution does not require a full custodial arrest to permit a complete search of the arrestee" where probable cause to arrest exists. *Lovelace v. Commonwealth,* 27 Va. App. 575, 585, 500 S.E. 2d 267, 272 (1998); *see also Rhodes v. Commonwealth,* 29 Va. App. 641, 643 n. 1, 513 S.E. 2d 904, 905 n. 1 (1999) (*en banc*) (noting that our panel decision in "*Lovelace* is no longer a viable precedent").

[6] Despite the fact that Rhodes was not arrested, we commented in footnote 6 of the opinion that an arrest in violation of Code § 19.2-74 would be unconstitutional and, thus, would require exclusion. *Rhodes,* 29 Va. App. at 645 n. 6, 513 S.E. 2d at 907 n. 6. However, this statement was unnecessary to the decision and, as such, is dicta. In any event, the statement appears to be wrong in light of long-standing precedent from the United States Supreme Court, federal circuit courts of appeal, and Virginia courts, cited *supra.*

case law provides for an exclusionary rule.[7] Accordingly, I would vote to affirm Moore's conviction.

[7] In this regard, I find the Virginia Supreme Court's recent holding affirming this Court's decision in *Hunt v. Commonwealth*, 42 Va. App. 537, 592 S.E. 2d 789 (2004) (*en banc*) (affirming the defendant's conviction "without opinion"), to be instructive. In a memorandum, the Court noted the following:

> Assuming, without deciding, that a violation of Code § 19.2-74 occurred, the defendant failed to establish that he was entitled to suppression of the evidence obtained as a result of that search. *In the absence of a violation of defendant's constitutional rights, the remedy of exclusion of evidence is not available for a statutory violation.*

Hunt, slip. op. at 1 (emphasis added). To the extent the majority opinion interprets the Supreme Court's opinion in *Lovelace* as standing for the proposition that a search incident to an arrest that violates Code § 19.2-74 is constitutionally impermissible, the Supreme Court's order in *Hunt* stating that exclusion does not follow after such an illegal arrest indicates that *Lovelace* cannot be so interpreted.

REFERRED: PRE-SENTENCE INVESTIGATION REPORT

FIPS CODE: 740

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH
HEARING DATE: JULY 23, 2003
JUDGE: HONORABLE MARK S. DAVIS

COMMONWEALTH OF VIRGINIA
V.
DAVID LEE MOORE, DEFENDANT
Offense Date: 02-20-03
SSN: XXX-XX-XXXX DOB: 10-28-74 SEX: M

FELONY ORDER CR03-0611

This day came the defendant, who appeared with his appointed attorney, Amy Chudzinski, the assistant public defender. Ali Sprinkle represented the Commonwealth.

Thereupon, the defendant was arraigned, and after being advised by his counsel pleaded not guilty to possession with intent to distribute cocaine (18.2-248), as charged in the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case. And the case having been heard, counsel for the accused moved to strike the Commonwealth's evidence, which motion, being fully heard, **was overruled**. At the conclusion of all the evidence, the defendant, by counsel renewed his previous motion, which motion **was overruled**.

And the Court having heard all the evidence and argument of counsel finds the defendant **guilty of possession with intent to distribute cocaine, as charged**. The defendant is referred for a presentence investigation and report. The Court directs the Probation Officer of this Court to thoroughly investigate and report to the Court as prescribed by law, and this case is continued to October 7, 2003 at 9:00 a.m. in the Portsmouth Circuit Court.

The Court certifies that the accused and his counsel were present in person at every stage of these proceedings.

The Court dispenses with the Rule 1:13 counsel endorsement requirement.

7-25-03 ENTER: /s/ Mark S. Davis
Date Mark S. Davis, Judge

FIPS CODE: 740

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF PORTSMOUTH
HEARING DATE: OCTOBER 7, 2003
JUDGE: HONORABLE MARK S. DAVIS

COMMONWEALTH OF VIRGINIA
V.
DAVID LEE MOORE, DEFENDANT

This case came before the Court for sentencing, the defendant, who appeared with his attorney, Amy Chudzinski, the public defender. The Commonwealth was represented by Ali Sprinkle.

On July 23, 2003 the Court found the defendant guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR03-0611-01	**possess with intent to distribute cocaine (F)**	**02-20-03**	**18.2-248**

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code Section 19.2-299.

Pursuant to the provisions of Code Section 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the

guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:
Incarceration with the Virginia Department of Corrections **for the term of five (5) years.**

This sentence shall run **consecutively** with all other sentences.

The Court **SUSPENDS** one (1) year and six (6) months of this sentence upon the following condition:

Supervised Probation. The defendant is placed on probation, upon release, to commence under the supervision of a Probation Officer **for one (1) year and six (6) months,** or unless sooner released by the Court or by the probation officer. The defendant shall comply with all the rules and requirements set by the probation officer. Probation shall include substance abuse screening, assessment, testing and/or treatment as prescribed by the probation officer.

Operator License. The defendant's privilege to drive or operate a motor vehicle is suspended for six (6) months.

Cost. The defendant shall pay the costs of these proceedings.

The accused was advised that he has a right to apply for an appeal from this conviction to the Virginia Court of Appeals, and that counsel would be appointed, if requested, and he noted an appeal at this time.

The Court dispenses with the Rule 1:13 counsel endorsement requirement.

Date 10-10-03 Enter: /s/ Mark S. Davis
Mark S. Davis, Judge

DEFENDANT IDENTIFICATION:
Alias: N/A
SSN: XXX-XX-XXXX DOB: 10-28-74 SEX: M

SENTENCING SUMMARY:

Total Sentence Imposed:	**FIVE (5)YEARS**
Total Sentence Suspended:	**ONE (1 YEAR AND SIX (6) MONTHS**

3

No. 06-1082

FILED
MAY 29 2007
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IN THE

Supreme Court of the United States

Commonwealth of Virginia,
Petitioner,

v.

David Lee Moore.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION

Thomas C. Goldstein
Steven C. Wu
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

S. Jane Chittom
(Counsel of Record)
Stacie A. Cass
OFFICE OF THE APPELLATE
DEFENDER
701 E. Franklin St., Ste. 1001
Richmond, VA 23219
(804) 225-3598

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

May 29, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police to seize and search a person incident to an arrest for a state law offense when the relevant state law permits only the issuance of a citation and prohibits the arrest.

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STATEMENT OF THE CASE

Under Virginia law, driving with a suspended license is a Class 1 misdemeanor. Va. Code § 46.2-301(C). State law further provides, with exceptions not applicable here, that an arrest is not permitted for such an offense. Rather, the officer "shall . . . issue a summons . . . to appear at a time and place to be specified in such summons . . . . [U]pon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody." *Id.* § 19.2-74(A)(1).

On February 20, 2003, two city police detectives detained respondent David Lee Moore for driving with a suspended license. Notwithstanding the fact that Virginia law forbids officers from arresting motorists for this conduct, the detectives who stopped Moore decided to make a full custodial arrest rather than issue him a summons or citation. The officers later conceded that they had no reason to make an arrest rather than issue the summons required by law, and the State did not attempt to establish that the officers had made an innocent mistake. Rather, when asked why they did not issue a summons, one of the detectives answered that it was "[j]ust our prerogative. We chose to effect an arrest." Pet. App. 2, n.2.

The two detectives illegally handcuffed Moore, placed him in a police vehicle, and took him to another location. Over an hour later, they conducted a full search of Moore's person and found cocaine in his pocket. *Id.* at 2, 14.

The state charged Moore with possession with intent to distribute cocaine. Respondent moved to suppress the fruits of the search under the Fourth Amendment. *Id.* at 37. The trial court denied the motion, reasoning that the Constitution does not require suppression when an officer arrests a suspect for a misdemeanor committed in his presence and conducts a

search incident to that arrest. *Id.* In a bench trial, Moore was convicted and sentenced to five years imprisonment. *Id.*

A panel of the Court of Appeals of Virginia reversed, holding that the search was unconstitutional under this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *See* Pet. App. 42-44. In *Knowles*, this Court unanimously held that the search incident to arrest exception to the warrant requirement does not extend to cases in which officers do not arrest the suspect, but only issue a citation. *Id.* The Court of Appeals in this case reasoned that the search incident to arrest exception similarly did not apply to a search conducted incident to an illegal arrest for a citation-only offense:

> [I]n light of the Supreme Court's declaration in *Knowles* that the Fourth Amendment does not permit a search incident to issuance of a citation, we now conclude that a search conducted pursuant to a custodial arrest that violates Code § 19.2-74 constitutes, in effect, a search incident to issuance of a citation in violation of the Fourth Amendment. *Knowles* holds that if an officer, exercising his discretion, chooses only to issue a citation rather than to effect a full arrest, a search incident to the issuance of that citation is unconstitutional. We see no reason to reach a different result when it is the legislature that has concluded that, absent additional facts, only a citation should be issued for a particular offense.

Id. at 43-44 (footnote omitted).

On rehearing *en banc*, the full Court of Appeals in turn reversed and reinstated the conviction by a divided vote. *Id.* at 13, 27. The majority conceded that state law forbade arresting Moore simply for driving with a suspended license, but nonetheless held that neither the arrest nor the subsequent search violated the Fourth Amendment. The majority

reasoned that an arrest based on "probable cause" is not unconstitutional even when the jurisdiction whose law the police believes the suspect has broken does not allow arrests for violations of that law. *Id.* at 21-22. The majority further concluded that, even when an arrest violates state law in this manner, a search incident to arrest does not violate the Fourth Amendment. *Id.* at 22-24.

Moore appealed to the Supreme Court of Virginia, which unanimously reversed and held that the Fourth Amendment required suppression. The court rejected petitioner's assertion that the search of respondent's person was constitutional because it was conducted incident to an arrest supported by probable cause. *Id.* at 6-7. That argument, the court explained, rested on the incorrect premise that the Fourth Amendment permits a warrantless search of an individual whenever an officer chooses to arrest him, even if state law forbids the officer from conducting an arrest for that particular offense. *Id.*

The court thus acknowledged that under *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), if "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Pet. App. 7 (quoting *Atwater*, 532 U.S. at 354). But the court concluded that *Atwater* provided "little support for the Commonwealth's position in this case" because "*Atwater* only involved the legality of an *arrest*; it did not involve any question about a *search* incident to arrest." *Id.* (emphasis added). Those questions, the court recognized, are quite distinct.

The court explained that the Fourth Amendment generally prohibits warrantless searches, subject to limited exceptions including "a search incident to arrest exception . . . which allows a full field-type search of the person incident to

a lawful custodial arrest." *Id.* at 5. The court further recognized, however, that this exception does not extend to every case in which officers have probable cause to believe that an individual has violated the law. To the contrary, this Court's decision in *Knowles* established "that the Fourth Amendment forbids expansion of the search incident to arrest exception to include a search incident to citation." *Id.* at 6. The court rejected petitioner's attempt to distinguish *Knowles* on the ground that "the defendant there was not arrested," whereas respondent in this case was actually, if unlawfully, arrested. *Id.* Reaffirming its prior decision in *Lovelace v. Commonwealth*, 522 S.E.2d 856 (Va. 1999), the court rejected that distinction. *See* Pet. App. 10. "Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field-type search." *Id* at 11.

REASONS FOR DENYING THE WRIT

The Fourth Amendment's protection against "unreasonable searches and seizures" (U.S. Const. amend. IV) embodies the foundational principle that – absent the application of a special exception – individuals will not be seized and searched without a warrant issued upon probable cause. This Court has recognized certain narrow exceptions to the warrant requirement, including an exception for a search incident to a *lawful* arrest. *See, e.g., United States v. Robinson*, 414 U.S. 218, 224 (1973). In *Knowles*, 525 U.S. at 144, this Court refused to extend that exception to cases in which an officer conducts a search incident to issuing a citation. In the present case, the Virginia Supreme Court considered the constitutionality of a search incident to an arrest for driving with a suspended license – an offense for which state law permits issuance of a citation, but in these circumstances forbids arrest. Relying on *Knowles*, the court refused to extend the exception to a case in which the suspect

had committed an offense for which a citation was the only legally permissible response, but the officer nonetheless illegally arrested the defendant. Pet. App. 11.

Petitioner asserts that the ruling below conflicts with the decisions of federal courts of appeals, state supreme courts, and the teachings of this Court. That claim is unsupported. There is no conflict of authority on the question decided in this case: whether, after *Knowles*, the Fourth Amendment permits a warrantless search incident to an arrest for an offense to which state officers may only respond by issuing a citation. Moreover, the Virginia Supreme Court's decision is correct and compelled by this Court's Fourth Amendment jurisprudence, which recognizes that it is fundamentally unreasonable for an officer to search or seize a person based on nothing more than probable cause to believe that the suspect has committed an offense that the state has determined is insufficiently serious to justify the substantial intrusion upon individual freedom that results from an arrest.

I. The Decision Below Does Not Create A Certworthy Conflict Among The Lower Courts.

The decision below rests on a narrow holding of constitutional law. Relying on this Court's decision in *Knowles*, the Virginia Supreme Court held that the search incident to arrest exception to the Fourth Amendment's warrant requirement does not extend to cases in which officers unlawfully arrest a suspect for conduct that permits only a citation. Petitioner's assertion of a split of authority is twice misplaced, relying first on cases considering the constitutionality of *arrests* rather than of *searches*, and second on cases that do not involve searches incident to arrests for *citation-only* offenses, which were the only kinds of searches addressed by the decision in this case. Moreover, even if there were a division of authority on the question

presented, the issue would not be sufficiently recurring or important to warrant this Court's review at this time.

1. It is common ground that when the police arrest a suspect in violation of the Fourth Amendment, any evidence obtained as a result ordinarily must be suppressed as the fruit of that unconstitutional arrest. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 602-03 (1975); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Attempting to take advantage of that rule, defendants have sometimes argued that an *arrest* in violation of state law was also an *arrest* in violation of the Fourth Amendment and that, therefore, any evidence obtained in a subsequent search must be suppressed as the fruit of an unconstitutional arrest. Petitioner cites a number of cases rejecting this argument on the ground that an arrest in violation of state law does not necessarily constitute an unreasonable *seizure* in violation of the Fourth Amendment. *See* Pet. 9-11. These cases have concluded that the Fourth Amendment permits an arrest based on probable cause to believe the suspect has committed a criminal violation of state law, even if state law would not permit the arrest for some reason or another. *See, e.g., United States v. Van Metre*, 150 F.3d 339, 346-47 (4th Cir. 1998); *United States v. Walker*, 960 F.2d 409, 416 (5th Cir.1992); *United States v. Miller*, 452 F.2d 731, 733-74 (10th Cir. 1971).

Those decisions have nothing to do with the holding in this case. The Virginia Supreme Court did not suppress the evidence in this case as the fruit of an unconstitutional *arrest*. Indeed, the court expressed no view as to whether respondent's arrest was in violation of the Fourth Amendment. Instead, the court held that even if the arrest were constitutional (as the citation was in *Knowles*), the incident search was not. The court explained that the Fourth Amendment generally prohibits warrantless searches of individuals, subject to the limited search incident to arrest

exception. Pet. App. 5. The question in this case was whether that exception applies when the defendant was arrested for an offense that, under state law, is subject only to citation and release. *Id.* at 6, 7. As the Fourth Circuit has explained, there is "a difference between using state law to determine the constitutionality of an arrest" on the one hand, and "using it to evaluate an arrest for the purposes of the incident search doctrine," on the other. *Street v. Surdyka*, 492 F.2d 368, 372 n.7 (4th Cir. 1974). In "the latter instance, the state seeks to validate an otherwise unconstitutional search by tying it to a valid arrest. It may be that an arrest, though constitutional under federal standards, cannot serve as the basis for an incident search if it is illegal under state law." *Id.* Although the Fourth Circuit had no occasion to definitely resolve that question in *Surdyka*, *see id.*, that was the only question posed by this case and answered by the Virginia Supreme Court in its decision below.

That is not, however, the question addressed in the cases petitioner asserts to be in conflict with the opinion in this case. Instead, petitioner's cases uniformly consider only the distinct question of whether an *arrest* in violation of state law is unconstitutional, without ever separately considering the scope of the search incident to arrest exception or the possibility that the search might be unconstitutional even if the arrest is not. In fact, in nine of the fifteen cases cited as part of the split, there either was no search conducted or the search was not challenged.[1] For example, in *United States v.*

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[1] **1st Cir.**: *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (no search; section 1983 suit claimed only unconstitutional arrest);

3d Cir.: *Anderson v. Haas*, 341 F.2d 497, 498 (3d Cir. 1965) (same);

4th Cir.: *United States v. Van Metre*, 150 F.3d 339, 346-47 (4th Cir. 1998) (search not challenged);

Van Metre, 150 F.3d 339 (4th Cir. 1998), the defendant moved to suppress a confession he gave after an allegedly unconstitutional arrest in his hotel room. Although the room was searched after the arrest, the defendant did not contest the constitutionality of the search and made no attempt to suppress the evidence found in the room (a "single marijuana cigarette" having no relevance to his kidnapping charge, *id.* at 344). Instead, he contended that "his confessions and the evidence obtained as a direct result thereof should have been suppressed because they were fruits of an illegal arrest." *Id.* at 346. The Fourth Circuit thus had no occasion to decide the scope of the search incident to arrest exception.[2]

Even in the cases involving a search incident to arrest, the courts did not confront the argument accepted by the Virginia Supreme Court in this case: namely that an arrest in violation of state law, while not unconstitutional in itself, does not provide a basis for invoking the search incident to

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7th Cir.: *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (Section 1983 suit claiming only unconstitutional arrest);

11th Cir.: *Knight v. Jacobson*, 300 F.3d 1272, 1274 (11th Cir. 2002) (same);

Massachusetts: *Commonwealth v. Lyons*, 492 N.E.2d 1142, 1144 (Mass. 1986) (no search);

Michigan: *People v. Hamilton*, 638 N.W.2d 92, 94 (Mich. 2002) (same);

North Carolina: *State v. Eubanks*, 196 S.E.2d 706, 707 (N.C. 1973) (same);

Ohio: *State v. Droste*, 697 N.E.2d 620, 621 (Ohio 1998) (same).

[2] Accordingly, petitioner's assertion (Pet. 13) of an untenable conflict between the state and federal courts of Virginia is unfounded. As noted above, the Fourth Circuit itself has long recognized that an arrest may be constitutional while the search incident to that arrest may be barred by the Fourth Amendment for precisely the reasons given by the Virginia Supreme Court in this case. *See Surdyka*, 492 F.2d at 372 n.7.

arrest exception.[3] For example, in *People v. McKay*, 41 P.3d 59, 63 (Cal. 2002), the defendant argued solely that drugs found in a search incident to his arrest for a traffic infraction should be suppressed because his *arrest* was unconstitutional. *See id.* at 63 (defendant argued that drugs should be suppressed because "a custodial arrest for a fine-only offense ... violates the Fourth Amendment," and, in the alternative, because "his custodial arrest . . . violated the federal Constitution by the deputy's failure to comply with . . . the state statute that governs the arrest procedure for this infraction"). There is no indication that the defendant argued that the evidence should be suppressed even if the arrest was constitutional, on the ground that the search incident to arrest doctrine would not extend to his case. Accordingly, the California Supreme Court considered only whether the "defendant's arrest, notwithstanding its constitutionality under *Atwater*, became unconstitutional because it assertedly was not authorized" under state law. *Id.* at 64. And the court ultimately decided only that "so long as the officer has

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[3] **5th Cir.**: *United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992) (unclear whether search challenged, but search was not, in any event, separately analyzed);

6th Cir.: *United States v. Wright*, 16 F.3d 1429, 1433-37 (6th Cir. 1994) (assuming without analysis that there is no distinction between the relevance of state law to the constitutionality of the arrest as opposed to the constitutionality of the search);

10th Cir.: *United States v. Miller*, 452 F.2d 731, 732 (10th Cir. 1971) (evaluating only the defendant's "sole contention ... that [his] *arrest* was illegal and that the sawed-off shotgun obtained as a result thereof is not admissible against him.") (emphasis added); *see also id.* (evidence was, in any event, in plain view of arresting officer);

California: *People v. McKay*, 41 P.3d 59, 64-72 (Cal. 2002) (not analyzing search incident to arrest exception);

Colorado: *People v. Hamilton*, 666 P.2d 152, 732 (Colo. 1983) (*en banc*) (same).

probable cause to believe that an individual has committed a criminal offense, a custodial *arrest* – even one effected in violation of state arrest procedures – does not violate the Fourth Amendment." *Id.* at 71 (emphasis added).[4] There is no conflict between that holding on the constitutionality of an arrest and the decision in this case on the constitutionality of a search.[5]

2. Even setting aside the fact that none of the cases petitioner relies upon grapple directly with the scope of the search incident to arrest exception or the arguments made in this case, the precedents cited by petitioner are inapposite for an additional and distinct reason: none considers whether the search incident to arrest exception extends to searches incident to an arrest for a *citation-only* offense in the aftermath of this Court's relatively recent decision in *Knowles*.

The decision below was grounded upon, and limited by, the special status of citation-only offenses after *Knowles*. The Virginia Supreme Court did *not* hold that a warrantless search incident to arrest is unconstitutional whenever the arrest violates some requirement of state law, no matter how technical or trivial. To the contrary, the court limited its holding to cases in which officers search a suspect after arresting him for an offense that state law has deemed so minor that the serious invasion of privacy entailed by an arrest cannot be allowed. *See* Pet. App. 11. And it reached

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[4] Even this conclusion was ultimately unnecessary to the disposition of the case – the court eventually concluded that the arrest was consistent with state law in any event. *Id.* at 72.

[5] For the same reason, there is no relevant conflict between the California Supreme Court's decision on the constitutionality of arrests in *McKay* and the Ninth Circuit's ruling on the constitutionality of a search incident to an illegal arrest for a citation-only offense in *United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993). *Contra* Pet. 13.

that conclusion based on its reading of this Court's decision in *Knowles*, which likewise focused on the proper application of the search incident to arrest exception in the context of citation-only offenses. *See id.*; *Knowles*, 525 U.S. at 116-19.

Accordingly, in order to demonstrate an on-point division of authority potentially worthy of this Court's intervention, petitioner must show that the lower courts are divided on the application of the search incident to arrest exception to citation-only offenses in the aftermath of *Knowles*. This, petitioner cannot do. To begin with, only three of the cases cited by petitioner were decided after this Court's decision in *Knowles*, and two of those decisions do not even cite what the Virginia Supreme Court found to be the principal authority for its decision.[6] It is far too early to say whether any current conflict in the lower courts will persist once courts have the opportunity to consider the specific question presented in this case in light of this Court's most recent on-point pronouncement.

Even setting *Knowles* to one side, the vast majority of petitioner's cases do not involve a citation-only offense. Instead, most of the cases involve serious crimes that were properly subject to arrest, except that the officers failed to observe various technical state law requirements for effecting the arrest: *e.g.*, the defendant was properly subject to arrest but the particular arresting officer was acting outside of his or her jurisdiction; the arrest warrant was procedurally defective; officers did not have a warrant that was required by state law but not by the Fourth Amendment; or the officers could not

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[6] *See McKay*, 41 P.3d at 68 n.6 (noting *Knowles* in passing); *Knight*, 300 F.3d at 1272 (not citing *Knowles*); *Hamilton*, 638 N.W.2d at 95-97 (same).

satisfy a heightened probable cause standard imposed by state (but not federal) law.[7]

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[7] **1st Cir.**: *Vargas-Badillo*, 114 F.3d at 6 (arrest for drunk driving violated state law warrant requirement for misdemeanors not committed in officer's presence);

3d Cir.: *Anderson*, 341 F.3d at 498 (arrest for firing shotgun in residential neighborhood while intoxicated was invalid for some unspecified state law reason).

4th Cir.: *Van Metre*, 150 F.3d at 347 (arrest on out-of-state arrest warrant violated state law requiring local "fugitive from justice" warrant).

5th Cir.: *Walker*, 960 F.2d at 415 (arrest on drug distribution charges alleged to be "unlawful under Texas law" for some unspecified reason);

6th Cir.: *Wright*, 16 F.3d at 1433 & n.2 (arrest for drug conspiracy violated state law imposing stricter probable cause standard than the Fourth Amendment for warrantless arrests based on informant's tips);

7th Cir.: *Gordon*, 29 F.3d at 297 (arrest warrant for criminal trespass was issued in violation of state law requiring prior opportunity for hearing in cases involving ownership disputes);

10th Cir.: *Miller*, 452 F.3d at 733 (arrest apparently for illegal firearm discharge within city limits alleged be in violation state law requiring warrant to stop vehicle for misdemeanor not committed in officer's presence);

11th Cir.: *Knight*, 300 F.3d at 1272 (arrest for making death threats alleged to have violated state law requiring warrant for misdemeanors not committed in an officer's presence);

Colorado: *Hamilton*, 666 P.2d at 154 (Colo. 1983) (arrest for breaking into a bank invalid because made outside officers' territorial jurisdiction)

Massachusetts: *Lyons*, 492 N.E.2d at 1145 (indecent exposure arrest asserted to be involved because officers violated law requiring defendant be given notice and hearing before warrant for a misdemeanor may properly issue).

Michigan: *Hamilton*, 638 N.W.2d at 95 (drunk driver arrested outside officers' territorial jurisdiction);

North Carolina: *Eubanks*, 196 S.E.2d 706 (N.C. 1973) (same)

In fact, of the fifteen cases cited by petitioner, only *two* involve and consider the relevance of a citation-only offense: the Eleventh Circuit's pre-*Knowles* decision in *Knight v. Jacobson*, and the California Supreme Court's decision in *People v. McKay*. As noted above, *Knight* was a Section 1983 case challenging only the constitutionality of the arrest; it did not involve a search and, therefore, did not implicate *Knowles* and the search incident to arrest exception. *See* 300 F.3d at 1274. And while *McKay* was decided after *Knowles* and did involve a search, the California Supreme Court considered only whether the results of the search should be suppressed as the fruits of an unconstitutional arrest. *See McKay*, 41 P.3d at 64-72.[8]

Ohio: *Droste*, 697 N.E. 2d at 621-22 (drunk driving arrest by liquor control investigators lacking traffic law enforcement authority).

[8] The same was true in *United States v. Lewis*, 183 F.3d 791 (8th Cir. 1999), a post-*Knowles* case cited by petitioner's amici. There, the defendant argued only that the evidence obtained through the search should be suppressed as the fruit of an unconstitutional arrest. *See id.* at 793. He did not, as respondent did in this case, argue that the search was itself unconstitutional under *Knowles*. It is thus understandable that the Eighth Circuit did not cite or discuss *Knowles* in its opinion. Moreover, the current status of *Lewis* is not at all clear. Even at the time it was issued, two members of the *Lewis* panel expressed grave reservations about the court's holding but considered themselves bound by circuit precedent. *See id.* at 794-95 (Heaney, J., concurring) (finding panel bound by *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995), but urging that *Bell* be reconsidered en banc); *id.* at 795-96 (Goldberg, J., concurring) (agreeing that *Bell* was binding, but concluding that the decision "ignore[d] important precedent" relevant to the question). In a future case, the court would be free to decide whether *Lewis* and *Bell* remain good law after this Court's more recent decision in *Knowles*. *See United States v. Pratt*, 355 F.3d 1119, 1124 n.3 (8th Cir. 2003) (noting that continuing validity of *Bell* is open to review in a proper case, but concluding that that question was not presented in the case before the panel).

Accordingly, there is no reason to believe that the courts relied upon by petitioner would have decided this case differently than did the Virginia Supreme Court, or that the Virginia Supreme Court would hold unconstitutional a search incident to a procedurally deficient arrest for a generally arrestable offense.

3. The foregoing also demonstrates that certiorari is unwarranted because the petition does not pose any question of recurring importance. Indeed, petitioner and its amici have only been able to find a handful of instances in the past forty years in which courts have been called upon to address searches incident to an arrest made for a citation-only offense, despite the fact that millions of arrests and prosecutions have occurred during that time. If the issue somehow becomes more prevalent in the future, this Court will have ample opportunity to take a future case in which the question arises. Further percolation is particularly desirable here, where only one court has fully considered the issue in light of this Court's decision in *Knowles*.

II. The Virginia Supreme Court Correctly Held That The Fourth Amendment Prohibits Officers From Searching An Individual Incident To An Unlawful Arrest For A Citation-Only Offense.

Certiorari is also unwarranted because the Virginia Supreme Court's decision is correct, respecting both this Court's decision in *Knowles* that the Fourth Amendment prohibits searches incident to arrests for citation-only offenses and the State's prerogative to forbid the substantial intrusion of an arrest and search upon its citizens in response to minor citation-only offenses. The rule proposed by petitioner, on the other hand, invites abuse, as local officers would have an incentive to ignore state limitations on their authority, knowing that that evidence seized in violation of state law may be used in state or (at the very least) federal court. At

the same time, prohibiting searches incident to unlawful arrests is consistent with long-held understandings of the proper balance of interests between citizens' privacy and legitimate law enforcement needs.

A. The Virginia Supreme Court Correctly Declined To Extend The Search Incident To Arrest Exception To Unlawful Arrests For Citation-Only Offenses.

This Court has long recognized an exception to the general Fourth Amendment prohibition against warrantless searches for a search incident to a *lawful* arrest. The Virginia Supreme Court did not err in concluding that, under this Court's decision in *Knowles*, the Fourth Amendment precludes a search incident to an *unlawful* arrest effected by an officer who only had authority to issue a summons or citation.

1. This Court's Prior Decisions Support The Virginia Supreme Court's Holding That An Unlawful Arrest Will Not Support A Constitutional Search Incident To That Arrest.

The suppression of evidence under the Fourth Amendment is, of course, governed by federal law. Neither respondent nor the Virginia Supreme Court has suggested otherwise. But all also agree that state law plays a substantial role in Fourth Amendment analysis – the state controls the circumstances under which a constitutional search may occur by, at the very least, defining the elements of a state criminal offense. *See* Pet. 21.[9] The question here is whether state law

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[9] Accordingly, petitioner's reliance (Pet. 15-16) on *Elkins v. United States*, 364 U.S. 206 (1960), and *California v. Greenwood*, 486 U.S. 35 (1988), is misplaced. While *Elkins* emphasized that federal law determines the suppression of evidence under the Fourth Amendment, 364 U.S. at 223-24, and *Greenwood* held that Fourth Amendment expectations

plays a concomitant role in determining the reasonableness of police conduct by delimiting the kinds of offenses for which warrantless searches may be conducted under the search incident to arrest exception. The Virginia Supreme Court rightly concluded that it does.

1. This Court has never held that the search incident to arrest doctrine permits a search whenever an officer arrests an individual regardless of the officer's legal authority to effect the arrest. To the contrary, in *Robinson*, this Court took care to state nine times that its holding applied only to searches incident to a "lawful" arrest. *E.g.*, 414 U.S. at 224 ("It is well settled that a search incident to a *lawful* arrest is a traditional exception to the warrant requirement of the Fourth Amendment.") (emphasis added); *id.* at 235 ("It is the fact of the *lawful* arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is ... a 'reasonable' search under that Amendment.") (emphasis added).

This careful language was no accident. It reflects the long-established constitutional understanding of the search incident to arrest exception. *See, e.g.*, *Preston v. United States*, 376 U.S. 364, 367 (1964) ("Unquestionably, when a person is *lawfully* arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused . . . .") (emphasis added); *Harris v. United States*, 331 U.S. 145, 151 (1947) ("Search and seizure incident to *lawful* arrest is a practice of ancient origin . . . .") (emphasis added); *Agnello v. United States*, 269 U.S. 20, 29 (1925) ("The right without a search warrant contemporaneously to search persons *lawfully* arrested . . . is

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of privacy are not affected by state law protections, 486 U.S. at 43, neither addressed the question at issue here or held that state law is irrelevant across the board.

not to be doubted.") (emphasis added); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (stating that the right "to search the person of the accused when *legally* arrested . . . has been uniformly maintained in many cases") (emphasis added).

There is no basis for petitioner's apparent view that by "lawful" arrests, this Court merely meant arrests that comply with the probable cause requirement of the Fourth Amendment even if the arrest is otherwise unauthorized. Indeed, this Court's decision in *Michigan v. DeFillipo*, 443 U.S. 31 (1979), makes clear that the opposite is true. In *DeFillipo*, the defendant was arrested for violating an ordinance that was later declared unconstitutional. A search incident to that arrest revealed that the defendant was in possession of controlled substances, and he was charged with drug possession. *Id.* at 33-34. In deciding whether the drug evidence should have been suppressed, this Court applied the established rule that "an arresting officer may, without a warrant, search a person *validly* arrested." *Id.* at 35 (emphasis added). In determining whether a valid arrest had occurred, this Court focused on both the state law authorization for the arrest and on whether the arrest otherwise violated the Fourth Amendment. The Court began by holding that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* at 36. In *DeFillipo*, the question required little analysis because the defendant did "not contend . . . that the arrest was not authorized by Michigan law," pursuant to the State's general arrest statute. *See id.* at 36, 40. The Court next concluded that an arrest based on probable cause to believe that a suspect had violated a not-yet-invalidated ordinance did not independently violate the Fourth Amendment. *Id.* at 36-38. Having concluded that the arrest was authorized by state law and did not otherwise violate the Fourth Amendment, the Court held that "the

search which followed was valid because it was incidental to that arrest." *Id* at 40.[10]

The analysis in *DeFillipo* was consistent with this Court's prior decision in *United States v. Di Re*, 332 U.S. 581 (1948). In that case, the defendant was arrested by local law enforcement officers, working with a federal investigator, for possessing counterfeit gasoline ration coupons. 332 U.S. at 582. In his federal prosecution, the defendant moved to suppress the evidence of the coupons because they were "obtained in violation of the Fourth Amendment." *United States v. Di Re*, 159 F.2d 818, 818 (2d Cir. 1947). The Second Circuit agreed, finding that the arrest was in violation of state law and that the search was therefore unconstitutional: "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion." *Id.* at 820. In this Court, the Government defended the search as falling within the search incident to arrest exception to the Fourth Amendment's warrant requirement. *See* 332 U.S. at 583-84. Applying the settled requirement that the search be incident to

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[10] Petitioner misconstrues the Court's holding as implying that state law is constitutionally relevant only to the extent that it "defines the crime for which the officer must have probable cause." Pet. 23. While it is obviously true that state law definitions of crimes are critical to the probable cause inquiry, nothing in the Court's statements in *DeFillipo* implies that this is the only way in which state law affects the Fourth Amendment analysis. Indeed, if, as petitioner argues, the constitutionality of a search incident to arrest depends in no way on the officer's state law authority to effect a custodial arrest, there would have been no reason for the Court's discussion of the state law authorization for the arrest in *DeFillipo*. *See* 433 U.S. at 39. Nor would the Court have taken such care to make clear that the general arrest statute authorizing the arrest was constitutional, even if the substantive ordinance was not. *See id.*

a *lawful* arrest, this Court explained that if the defendant "was lawfully arrested, it is not questioned that the ensuing search was permissible." 332 U.S. at 587. "Hence we must examine the circumstances and the law of arrest." *Id.* The Court rejected the Government's invitation to craft a federal common law governing arrest for federal crimes. Instead, the Court held that "in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. Finding that the arrest in the case before it did not comply with local law, this Court held that the arrest was unlawful and, accordingly, declined to apply the search incident to arrest doctrine. *Id.* at 588-95.

As in this case, the arrest in *Di Re* was unauthorized under state law and, as in this case, the lower court properly concluded that the search incident to arrest doctrine did not extend to a search incident to such an unlawful arrest. Petitioner attempts to distinguish *Di Re* on the ground that the Court adopted local law to provide the federal arrest rule as a matter of its "supervisory power[s]," not as a matter of Fourth Amendment law. Pet. 23. This argument is partially correct, but it misses the point because it conflates two different holdings in *Di Re*. The first holding established that state law determines the validity of the arrest for purposes of the federal prosecution. See 332 U.S. at 591. This holding was undoubtedly an exercise of the Court's supervisory authority. But the Court's second holding was constitutional: it held that the Fourth Amendment prohibits warrantless searches incident to an unauthorized arrest. *See id.* at 595. The evidence was excluded in *Di Re* because the search violated this *constitutional* principle. *Id.*

Petitioner cannot plausibly maintain that *Di Re*'s second holding was also an exercise of the Court's supervisory authority. This Court has been reluctant to use its supervisory

power to order suppression of evidence for conduct that does not violate the defendant's Fourth Amendment rights. *See generally*, *United States v. Payner*, 447 U.S. 727, 733-36 (1980); *see also* Pet. 20. It would thus be quite surprising had this Court in *Di Re*, without discussion, exercised its supervisory power to order suppression of the evidence if no constitutional principle were at stake. The Court's language also belies such a reading: In suppressing the evidence in *Di Re*, the Court explained the result as flowing from the way in which "the forefathers, after consulting the lessons of history, designed our Constitution." 332 U.S. at 595. If any doubt about the constitutional basis of *Di Re* remained, that ambiguity was removed in *Johnson v. United States*, 333 U.S. 10 (1948), where this Court applied *Di Re* to the suppression of evidence found in a search incident to an arrest in violation of state law on unambiguously constitutional grounds. *See* 333 U.S. at 13 (quoting Fourth Amendment as establishing rule governing the case); *id.* at 15 & n.5 (rejecting Government's assertion that search was constitutional under search incident to arrest exception because arrest was in violation of state law). Accordingly, while the rules governing the lawfulness of the arrest may have been developed by this Court in the exercise of its supervisory powers, the constitutional principle enforced in *Di Re* – precluding searches incident to unauthorized arrests – arises from the Fourth Amendment and remains applicable today.

2. Beyond enforcing this Court's established requirement that a warrantless search be preceded by a lawful arrest, the Virginia Supreme Court's decision in this case flows naturally from this Court's decision in *Knowles*. In *Knowles*, this Court rejected the view that the issuance of a citation justified dispensing with the Fourth Amendment's traditional requirement of a warrant to authorize the search of an individual. Accordingly, there is no question that the

officers in this case would have been constitutionally forbidden from searching respondent if they had complied with the state law precluding his arrest and had simply issued him the summons authorized by state law. It makes little sense to read the Fourth Amendment as forbidding a search when officers act lawfully but permitting the same search when officers exceed the lawful limits on their arrest authority.

Indeed, allowing such searches would create a substantial incentive for officers to effect unlawful arrests for a citation-only offense when they have a hunch, short of probable cause, that a search would turn up evidence of a more serious crime. Officers could arrest the suspect in violation of state law, conduct a search, then release him if no evidence of another crime is discovered. To be sure, the officer might face the theoretical prospect of punishment (if the citizen complained) or civil liability under state law (if state law provided a cause of action and if the citizen thought that the prospect of a *de minimis* damages award was worth the hassle and expense of litigation). But petitioner identifies no instance in which such an alternative deterrent to the exclusionary rule has been employed, and inevitably the net effect of petitioner's interpretation of the Fourth Amendment would be to provide officers with a roadmap for evading *Knowles*' prohibition against searches incident to citation.

3. The Virginia Supreme Court also rightly rejected petitioner's reliance on *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). In that case, this Court held that the Fourth Amendment does not prohibit a state from authorizing arrest for misdemeanors subject only to a fine. *Id.* at 323, 354. As the Virginia Supreme Court recognized, this Court made a point in *Atwater* of making clear that the misdemeanor arrest at issue was plainly authorized by the state legislature. *See id.* at 323. Nor did *Atwater* involve any question regarding the

search incident to arrest doctrine. *See id.* at 326 (question presented limited to constitutionality of arrest).

Petitioner claims that federalism interests are better promoted by leaving to each state the decision whether to suppress evidence obtained through a search incident to an arrest in violation of state law. Pet. 19-20. The rule petitioner proposes, however, would not achieve that result. Given that state exclusionary rules do not apply in federal court, *see United States v. Eastland*, 989 F.2d 760, 766-67 (5th Cir. 1993) (citing cases), under petitioner's rule states wishing to prohibit the use of evidence found incident to an illegal arrest would be unable to do so when the evidence was turned over to federal authorities for use in a federal prosecution, a fairly common occurrence. Petitioner's constitutional rule thus would resurrect a version of the "silver platter doctrine" disavowed by this Court in *Elkins v. United States*, 364 U.S. 206, 208 (1960), allowing state officials to circumvent limitations on their own authority by unlawfully obtaining evidence for use in federal trials. The federal structure and respect for state sovereignty is better served by constitutional rules that reinforce, rather than work against, the balance struck by the people's state representatives between the legitimate needs of law enforcement and the important privacy rights of its citizens.[11]

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[11] The Virginia state legislature remains free to effectively overrule the decision in this case by authorizing arrests for minor offenses like driving with a suspended license. In fact, legislation to do just that was proposed in, and rejected by, the Virginia General Assembly earlier this year. *See* HB 2943, 2007 Gen. Assem. Reg. Sess. (Va. 2007).

2. *Forbidding Searches Incident To Unlawful Arrests Is Consistent With The Common Law Tradition That Informs The Proper Interpretation Of The Fourth Amendment.*

Limiting the search incident to arrest exception to cases of authorized arrests is also consistent with the common law tradition that gave rise both to the exception and to its limitation to "lawful arrests." *See Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."). Petitioner has not identified any common law tradition allowing searches incident to unlawful arrests for offenses not subject to arrest under local law. Indeed, the tradition is understandably to the contrary. In an opinion relied upon by this Court in *Robinson*, 414 U.S. at 232, then-Judge Cardozo explained the "basic principle" of the common law thus: "Search of a person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds yet unknown for arrest or accusation." *People v. Chiagles*, 237 N.Y. 193, 197 (1923) (citing *Entrick v. Carrington*, 19 Howell's State Trials 1030). At common law, an officer's unauthorized or unjustified arrest of a citizen constituted a trespass.[12] Accordingly, the

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[12] *See Payton v. New York*, 445 U.S. 573, 592 (1980) ("At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense."); William Lloyd Prosser, PROSSER ON TORTS § 12, at 54 (3d ed. 1964) (noting that common-law actions for false arrest or false imprisonment are a "lineal descendent of the old action of trespass"); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624 (1999) ("[A]t common

search of a person seized in excess of an arresting officer's authority was unlawful as well. *See People v. DeFore*, 150 N.E. 585, 586 (N.Y. 1926) (holding that "[t]he search was unreasonable in the light of common law traditions" because the underlying arrest was not authorized by state law, and thus "[t]here was no lawful arrest to which the search could be an incident"). Limiting the search incident to arrest exception to arrests authorized by state law comports with this common-law background.

3. Traditional Standards Of Reasonableness Do Not Support Allowing Officers To Search Without A Warrant Those Whom They May Not Legally Arrest.

The Virginia Supreme Court's decision is furthermore consistent with "traditional standards of reasonableness," which take into account "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Houghton*, 526 U.S. at 300. Under these standards, it is unreasonable to conduct a search incident to an arrest for a state law offense for which the state prohibits arrest, because such an intrusion on individual privacy cannot be justified by the government's interests.

The costs to individual privacy of the search at issue here are serious and uncontested. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). State

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law, a search or arrest was presumed an unlawful trespass unless 'justified.'").

legislatures consciously make certain minor violations of state law subject only to citation precisely because of the common understanding that such violations are insufficiently serious to warrant such an intrusion. Limitations on arrest also recognize that minor violations are sufficiently common that authorizing officers to arrest for such offenses (*e.g.*, speeding, driving without a license, illegal parking, etc.) would risk a massive intrusion into the privacy of citizens. Balancing individual and governmental interests is quintessentially a legislative function, and the Virginia legislature has struck the balance in favor of freedom from arrest for such minor violations.

At the same time, the very fact that the State has prohibited arrests for minor offenses illustrates the Legislature's considered determination that arrests and searches for such minor violations are unnecessary to further any important state interest. While individual law enforcement officers may be interested in evading that limitation on their authority, that interest plainly does not constitute a "legitimate government interest" that must be taken into account in the Fourth Amendment analysis. Nor does the rule advanced by petitioner promote any legitimate interest in "preserv[ing] evidence on [the suspect's] person for later use at trial." *Robinson*, 414 U.S. at 234. As the Court recognized in *Knowles*, the government's interest in gathering evidence relating to a citation-only offense is *de minimis*: after the stop the police would have "all the evidence necessary to prosecute that offense." 525 U.S. at 118. Here, for example, there is no reason to think that a search of respondent's person or vehicle would have yielded any further evidence relating to his driving with a suspended license.

While the government interest in officer safety is "both legitimate and weighty," *Knowles*, 525 U.S. at 117, in the

context of citation-only offenses, it is insufficient to justify the intrusion on citizen privacy and the risk of manipulation to evade the limits imposed by state law and *Knowles*. Even petitioner does not go so far as to assert that the Fourth Amendment permits a search incident to *every* arrest. At the very least, petitioner must acknowledge that a search incident to an *unconstitutional* arrest violates the Fourth Amendment, even though an unconstitutional arrest poses no less danger to officers than an arrest for a citation-only offense. Likewise, even the act of issuing a citation carries some degree of risk, and may provoke a confrontation. Nonetheless, this Court in *Knowles* found that this risk was insufficient to justify permitting warrantless searches in such circumstances. 525 U.S. at 117-18. At the same time, what risk remains can be managed in other ways: an officer can order both driver and passenger out of the car, perform patdown searches upon reasonable suspicion that they may be armed or dangerous, and conduct a patdown of the interior of the vehicle upon reasonable suspicion that an occupant is dangerous. *See Knowles*, 525 U.S. at 117-18.[13]

The rule adopted here is also reasonable in light of the important practical interest in developing constitutional rules that are simple and easy to administer. *See Atwater*, 532 U.S. at 347. The Virginia Supreme Court's rule requires nothing more of officers than what is already required of them under local law: they must obey the limits on their arrest authority imposed by the state legislature. And, of course, state courts are already intimately familiar with enforcing those

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[13] If the unlawful arrest persists to the point where the individual is booked and placed in a jail cell, there would be a separate question whether the government's interests would permit a search prior to introducing the suspect into the jail population. Such a question is not implicated here because the search took place well before respondent was taken to the police station.

limitations. Petitioner complains that some of these rules are complex and difficult to administer. Pet. 16-17. For instance, petitioner cites Va. Code § 19.2-250, which establishes jurisdictional boundaries beyond which officers may not arrest a suspect. Pet. 17. This objection fails on two levels. First, officers are already required to know and adhere to these requirements of state law upon pain of discipline and potential liability for false imprisonment. It is thus unsurprising that petitioner is unable to marshal any evidence that local officers routinely violate the state law limitations on their arrest authority, as they would if the laws were as byzantine as petitioner alleges.

Second, as discussed above, the Virginia Supreme Court did not forbid searches incident to arrests that fail to comply with such procedural limitations; the court held only that the Fourth Amendment prohibits searches incident to arrests for offenses that are categorically not subject to arrest by any officer. Mere mistakes of form or procedure do not implicate constitutional questions, and Virginia so recognizes.[14] This case, however, presents a different issue: whether officers who make a custodial arrest in contradiction, indeed defiance, of state law that categorically prohibits the defendant's arrest may successfully claim that their search is lawful because it was incident to such an arrest. Petitioner cannot reasonably argue that it is too much to expect police officers to comply

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[14] For example, *Janis v. Commonwealth*, 472 S.E.2d 649, *aff'd en banc* 479 S.E.2d 534 (Va. App. 1996), held that suppression was not a remedy for violating a statutory requirements for establishing probable cause in an affidavit. *See also Troncoso v. Commonwealth*, 407 S.E.2d 349, 350 (Va. App. 1991) ("Historically, searches or seizures made contrary to provisions contained in a Virginia statute provide no right of suppression unless the statute supplies that right.") (citation omitted).

with such clear and categorical limits on their arrest authority.[15]

B. In Addition, The Arrest In This Case Was Unconstitutional Because The Officers Lacked Probable Cause To Believe Respondent Committed An Arrestable Offense.

In the alternative, suppression was proper here because the respondent's arrest violated the Fourth Amendment.

The Fourth Amendment requires probable cause to believe that the suspect has committed an *arrestable* offense, not simply that the suspect has committed an act in violation of state criminal law. While this Court has held that an arrest is generally reasonable if based on probable cause, it has never held that an arrest is constitutionally reasonable for *every* violation of state law – *i.e.*, without regard to whether state law allows arrest for that conduct. For instance, a police officer cannot arrest an individual who violates state law in a way that gives rise only to a civil infraction or a tort. Instead, the validity of an arrest under the Fourth Amendment depends upon whether state law considers the offense sufficiently serious to warrant invocation of the criminal justice system, including the possibility of arrest and search. The question here is whether the state legislature's role in the constitutional analysis is limited to deciding whether an offense should be treated as criminal or civil, or whether the constitutional analysis also defers to the state legislature's judgment that

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[15] This case does not involve an objectively reasonable mistake regarding the scope of an officer's arrest authority. *Cf. Illinois v. Rodriguez*, 497 U.S. 177 (1990) (search based on reasonable but mistaken belief that individual consenting to search of house had authority to give that consent did not violate Fourth Amendment). An officer conducting a search based on a reasonable but incorrect belief that the arrest was authorized would plainly be entitled to qualified immunity from any civil liability. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

some violations, although technically classified as criminal, do not warrant invocation of the full panoply of criminal enforcement mechanisms, including the power of arrest.

This Court's short-hand description of the Fourth Amendment's "probable cause" requirement, relied upon by petitioner, does not resolve that question. While the Court has sometimes said that "a warrantless arrest by a law enforcement officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed," *Devenpeck v. Alford*, 543 U.S. 146 (2004), it has always done so in the context of cases in which a state law allowed arrest for the offense at issue. In *Atwater*, for example, this Court took care to note that the misdemeanor arrest in that case was authorized by state law. 532 U.S. at 323. In other cases, state law authority to effect an arrest has been obvious and, apparently, undisputed.[16] Accordingly, this Court has never held – or even so much as suggested – that the Fourth Amendment allows officers to arrest anyone who they have probable cause to believe has committed a crime, regardless of whether the law creating that crime allows arrests for committing it.

The "ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (2006). An arrest based on nothing more than probable cause to believe that the suspect has committed a non-arrestable offense is just as unreasonable as an arrest based on probable cause to believe that the defendant has committed a civil tort. Petitioner can show no common law tradition

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[16] *See Devenpeck v. Alford*, 543 U.S 146 (2004) (impersonating a police officer); *Texas v. Brown*, 460 U.S. 730 (1983) (possessing heroin); *United States v. Watson*, 423 U.S. 411 (1976) (possessing stolen mail); *Brinegar v. United States*, 338 U.S. 160 (1949) (violating the Liquor Enforcement Act of 1936).

permitting arrests for offenses not subject to arrest under state law. Officers have no legitimate interest in arresting citizens for offenses the state legislature has determined insufficiently serious to warrant deprivation of the citizen's liberty, whether the offense violates civil law or constitutes a citation-only criminal offense. Finally, as discussed above, prohibiting arrests (and attendant searches) that are already forbidden by state law provides an understandable and easily administered rule for officers in the field as well as courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas C. Goldstein
Steven C. Wu
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

S. Jane Chittom
(Counsel of Record)
Stacie A. Cass
OFFICE OF THE APPELLATE DEFENDER
701 E. Franklin St., Ste. 1001
Richmond, VA 23219
(804) 225-3598

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF FOR PETITIONER

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

June 8, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONER

I. STATE AND FEDERAL COURTS ARE CLEARLY DIVIDED OVER THE ISSUE PRESENTED IN THIS CASE.

The question presented in the case is whether "the Fourth Amendment require[s] the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law." Pet. i. Even Respondent Moore acknowledges that, while the Virginia Supreme Court and the Ninth Circuit have ruled that the answer to this question is yes, four federal courts of appeal and two state supreme courts have ruled that the answer to this question is no. *See* Br. in Opp. 8-9 & n.3, 13 n.8 (listing cases from the Fifth, Sixth, Eighth, and Tenth Circuits and the California and Colorado Supreme Courts holding that evidence obtained in a search incident to an arrest founded upon probable cause but made in violation of state law should not be suppressed). This deep and mature conflict among the courts warrants this Court's review.

Moore seeks to minimize the conflict in several ways, none of which is availing. Moore chiefly takes issue with the reasoning of the federal and state courts that rejected motions to suppress based on state law violations. In particular, Moore asserts that those courts rejected the suppression motion based solely on their conclusion that the state law violation did not make the arrest itself unconstitutional; they did not "confront the argument . . . that an arrest in violation of state law, while not unconstitutional in itself, does not provide a basis for invoking the search incident to arrest exception." Br. in Opp. 8-9. This argument fails on a number of levels. Most fundamentally, those courts squarely addressed the question presented here and reached a conclusion opposite

that of the Virginia Supreme Court. It is therefore the law of those circuits and States that evidence will *not* be suppressed when it is found incident to an arrest based on probable cause but in violation of state law. Respondent may be disappointed by the reasoning of those courts, but that does not change their outcome. They definitively resolved the issue in a manner adverse to Moore's position.

Thus, in *United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992), the defendant "contend[ed] that the physical evidence and confession were fruits of an arrest that was unlawful under Texas law and, as such, should be suppressed." The Fifth Circuit rejected that argument, holding that "in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest" the defendant. *Id.* at 416. The Fifth Circuit rule could not be clearer – or in more direct conflict with the Virginia Supreme Court's rule. Likewise, in *United States v. Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994), the court addressed the defendant's contention that *United States v. Di Re*, 332 U.S. 581 (1947) – the principal case relied on by Moore, *see* Br. in Opp. 18-20 – establishes "that state law determines the validity of the arrest for purposes of determining whether evidence seized incident to the arrest is admissible." The Sixth Circuit disagreed, holding that the "reasoning of *Di Re* no longer applies"; "[t]he fact that the arrest . . . may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended." *Id.* at 1436, 1437. The Sixth Circuit answer to the question presented is crystal clear and, again, in direct conflict with the Virginia Supreme Court's answer. *See also United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (rejecting defendant's contention that evidence obtained incident to his arrest should be suppressed because Iowa law does not authorize arrest for operating a bicycle without a

headlight); *United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (rejecting argument that, under *Di Re*, evidence obtained incident to arrest should be suppressed because Oklahoma officers did not have the authority to make a warrantless arrest for a misdemeanor not committed in their presence); *Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (rejecting argument that evidence obtained incident to arrest made in Denver should be suppressed because the officers had no authority to arrest in that city).

The direct conflict between the California Supreme Court and the Ninth Circuit further illustrates the basic conflict on the question presented. In *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1992), the Ninth Circuit relied on *Di Re* to conclude that evidence (counterfeit currency) had to be suppressed because it was obtained incident to an arrest for operating a business without a license, which in California was not an arrestable offense. In *California v. McKay*, 41 P.3d 59 (Cal. 2002), the California Supreme Court addressed a near-identical situation: whether a bag of drugs found incident to an arrest for a misdemeanor should be excluded on the ground that, under California law, the misdemeanor was not an arrestable offense. The Court reviewed *Mota*'s reasoning at length and concluded it was "unpersuasive." *Id.* at 70. The Court first held that "the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution." *Id.* at 69 (citing numerous federal and state court opinions reaching same conclusion). The Court then specifically rejected the contention – echoed by Moore here – that the issue (and *Mota*'s reasoning) can also be cast as follows: "though the arrest was constitutional despite the violation of state law, the incidental search was not because [*United States v. Robinson*, 414 U.S. 218 (1973)] imposes as a prerequisite

not just a constitutional arrest but, more demandingly, a 'lawful custodial arrest.'" *Id.* at 70 (quoting 1 LaFave, *Search and Seizure*, § 1.5(b), p. 141). The California Supreme Court agreed with Professor LaFave that this Court's use of the phrase "lawful custodial arrest" in *Robinson* "refers not to the limitations of state law but rather to an overarching principle that all it takes to make a custodial arrest reasonable in a Fourth Amendment sense is that it be based on probable cause." *Id.* (quoting 1 LaFave, *Search and Seizure*, § 1.5(b), p. 141-142). The Court added that "[c]onditioning a search incident to arrest on the degree to which an otherwise constitutional arrest complies with state procedure, moreover, makes no sense. . . ." Moore's contention that "there is no relevant conflict between" *McKay* and *Mota* on the question presented in this case, Br. in Opp. 10 n.5, is therefore untenable.

As can be seen, Moore's assertion that these decisions focused solely on the constitutionality *vel non* of the arrest, rather than the suppression of evidence, is flatly wrong. Moreover, the distinction he seeks to draw between illegal arrests and unconstitutional arrests would not have affected the outcome of any of these cases. Regardless of whether the arrest is labeled "illegal" or "unconstitutional," the foundational question before the many courts that have addressed this issue remained whether the Fourth Amendment required that a search incident to an arrest that violated state law had to be suppressed. Moore does not – and could not – suggest that the elusive distinction he makes would have had any bearing on the outcome of the many cases cited in the Petition as establishing the conflict.

Moore also seeks to minimize the conflict among the lower courts on the ground that they "do not involve searches incident to arrests for *citation-only* offenses, which were the only kinds of searches addressed by the decision in this case."

Br. in Opp. 5. As an initial matter, that distinction is irrelevant. The nature of the state law limit on the officer's authority to arrest does not affect the resolution of the narrow question of constitutional law presented by this case. Whether the arrest is invalid under state law because the officer arrested beyond his jurisdictional boundary, or whether the arrest is invalid because the officer arrested for a misdemeanor in violation of the state law, the analysis proceeds in exactly the same fashion. Furthermore, contrary to Moore's assertion, several of the decisions that conflict with the Virginia Supreme Court (and Ninth Circuit) decisions *did* involve efforts to suppress evidence obtained incident to arrests for misdemeanor offenses for which state law did not authorize arrest. *See, e.g.*, *Bell*, 54 F.3d at 504; *Miller*, 452 F.2d at 733; *McKay*, 41 P.3d at 64. Thus, even if the issue were sliced every bit as thinly as Moore would like, there remains an intractable conflict among the courts.[1]

Moore further notes that many lower courts that have faced this issue have not addressed *Knowles v. Iowa,* 525 U.S. 113 (1998), and he urges this Court to allow lower courts to consider the impact of *Knowles*. Br. in Opp. 8. That suggestion should be rejected because *Knowles* is irrelevant.

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[1] Moore also seeks to cast out of the conflict cases – such as *Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998), and *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973), *cited in* Pet. 11 – where searches were not conducted. These cases involved unsuccessful efforts by defendants to suppress evidence (such as breathalyzer results) obtained following arrests for drunk driving that were made in violation of state law. In each case, the state supreme court held that suppression was unwarranted because the arrest was made with probable cause, *i.e.*, in conformity with federal constitutional requirements. Those holdings cannot be reconciled with the Virginia Supreme Court's conclusion that evidence obtained as a consequence of an arrest violating state law must be suppressed. In all events, even if these cases are put to the side, the conflict among the courts is deep and intractable.

Knowles held that police may not search incident to a citation because the twin rationales justifying such searches are not present: there is no need to gather evidence and the concern for officer safety is much reduced. *Knowles*, 525 U.S. at 116. Where, as here, the officers actually take a suspect into custody, those two rationales are present. *Knowles* did not resolve the question raised in the case at bar, and Moore does not seriously contend otherwise.

Finally, Moore claims that the Petition does not present "any question of recurring importance." Br. in Opp. 14. This is simply wrong, as the many decisions from State and Federal courts on this very issue attest. State and local law enforcement personnel, who conduct arrests on a daily basis, would greatly benefit from having this issue settled. As the Amicus Brief filed by Texas and thirteen other States explains, the States would greatly benefit from a clear determination of their powers and responsibilities. *See* Texas *et al.* Br. at 16-17. Courts have struggled long enough – and been divided long enough – over this basic issue. There is no reason for further delay.

II. MOORE'S DISCUSSION OF THIS COURT'S JURISPRUDENCE FURTHER DEMONSTRATES THE NEED TO GRANT CERTIORARI.

On the merits, Moore contends that the holding below rested on settled law from this Court. Br. in Opp. 14-20. He cites *Robinson*, where this Court upheld searches incident to "*lawful*" arrests. Br. in Opp. 16-17 (citing 414 U.S. at 224). This citation to *Robinson* simply begs the question of what constitutes a valid arrest under the United States Constitution, one that would permit a search incident to arrest. As noted in the Petition and above, the overwhelming majority of courts to consider the issue have concluded that

an arrest is lawful, for Fourth Amendment purposes, if it is based on probable cause, regardless of any additional state law strictures. Pet. 9-11. And if the arrest is lawful for federal purposes, any search incident to that arrest would be lawful under *Robinson* and later cases.[2]

Moore also contends that *Di Re* and *Johnson v. United States*, 333 U.S. 10 (1948), set forth a Constitutional standard rooted in State law. This contention is similarly misplaced. A number of courts as well as respected authority have failed to discern any constitutionally rooted holding in *Di Re*. *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67; *see also* 1 Wayne R. LaFave, *Search and Seizure*, § 1.5(b) (4th ed. 1996) ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations'"). Moreover, each of those courts concluded that *Di Re* is no longer good law in light of this Court's later holdings in *Elkins v. United States*, 364 U.S. 206, 223-24 (1960), and *California v. Greenwood*, 486 U.S. 35, 43 (1988), which concluded that the constitutional validity of a search does not hinge on matters of state law. *Id.* By contrast, the Ninth Circuit in *Mota* relied on *Di Re* and disagreed with "other circuits [that] have questioned the continued validity of *Di Re* as precedent in light of [later] Supreme Court's

[2] Moore also begs the question when he contends – for the first time in this case – that his arrest was unconstitutional because the officers lacked probable cause to believe Moore had committed an "arrestable offense." Br. in Opp. 28. Unsurprisingly, he does not offer any authority for the proposition that federal law mandates that officers have a double-barreled probable cause: (1) probable cause to believe the suspect committed a particular crime and (2) probable cause to conclude that a particular state law applies. As we argue, the United States Constitution is not concerned with the second type of probable cause. The remedy for violating the state law will hinge on remedies provided by state law, not the United States Constitution.

decisions." *Mota*, 982 F.2d at 1387. This divergent understanding of *Di Re*'s meaning and vitality once again highlights the need for this Court's intervention.

Ultimately, Moore's merits argument only strengthens the need to grant certiorari. If Moore is correct that this Court has long settled the issue, this Court should grant certiorari to bring back into the fold the numerous courts that have strayed from these (purported) holdings. Indeed, the conflict among the lower courts arises largely because of their differing views over this Court's decisions. In *Greenwood*, this Court held that the United States Constitution does not mandate the suppression of evidence obtained in a warrantless search and seizure deemed reasonable under the Fourth Amendment, but "impermissible as a matter of California law." 486 U.S. at 43. Most, but not all, lower courts have held that the same result obtains when it is not the search itself that violates state law, but the predicate arrest. Only this Court can resolve the conflict over whether that is so.

III. MOORE'S POLICY ARGUMENTS DO NOT DIMINISH THE IMPORTANCE OF THE CASE.

Moore asserts that the rule advocated by the State and adopted by most of the lower courts to consider the issue is one that "invites abuse." Br. in Opp. 14. In fact, the longstanding objective standard of probable cause affords citizens ample protection from arbitrary police exaction. Moreover, as this Court recognized in *Atwater v. Lago Vista*, 532 U.S. 318, 352 (2001), "it is in the interest of police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." For this reason and others, "[t]he country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Id.* at 353. Not surprisingly, Moore

has made no showing of any abuses in those jurisdictions that do not suppress evidence obtained incident to arrests made in violation of state law.

Moore also makes the related argument that the Virginia Supreme Court's decision is "consistent with 'traditional standards of reasonableness,'" Br. in Opp. 24 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)), because "[b]alancing individual and governmental interests is quintessentially a legislative function, and the Virginia legislature has struck the balance in favor of freedom from arrest for such minor violations." Br. in Opp. 25. This misses the point. Although the Virginia legislature has spoken on when officers may arrest for certain misdemeanors, it has *not* spoken on the separate question whether evidence should be excluded whenever it is obtained as a result of an arrest made in violation of that limitation. The Virginia General Assembly is, of course, fully capable of providing additional remedies to the citizens subjected to unlawful arrests.[3]

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[3] It bears adding that Moore has overstated the Virginia legislature's view of the seriousness of the offense in question. The offense of driving on a suspended license can, in fact, be an "arrestable offense." *Virginia Code* § 19.2-74 permits officers to arrest an individual for committing a misdemeanor when, among other things, the suspect presents a danger to himself or others or ceases to discontinue the unlawful act. Therefore, an officer has a measure of discretion to decide whether to make an arrest. Although the state courts rejected the argument here, Virginia contended that Moore was likely to continue the unlawful act of driving on a suspended license since he was caught driving, at night, by himself. Pet. App. 3, 46. In addition, driving on a suspended license is a Class 1 misdemeanor, *Virginia Code* § 46.2-301(C), which carries a maximum punishment of 12 months in prison and a fine of up to $2,500. *Virginia Code* § 18.2-11(a). Class 1 misdemeanors cover a wide range of offenses, including possession of marijuana, *Virginia Code* § 18.2-248.1(a)(1) and assault and battery, *Virginia Code* § 18.2-57(a). By contrast, the underlying infraction in *Atwater* was not wearing a seatbelt, an offense that carried no jail time and exposed the arrestee to, at most, a $50 fine. 532 U.S. at 323.

Because the Virginia legislature has not imposed the exclusionary rule as a remedy for police error of the sort that occurred here, we are left with the question whether the *federal* Constitution imposes such a remedy. In holding that it does, the Virginia Supreme Court misread this Court's precedents and brought itself into conflict with numerous federal courts of appeal and state supreme courts. Review by this Court is warranted.

CONCLUSION

For the reasons above, in the Petition itself, and in the Amicus Brief of Texas and thirteen States, the Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant Attorney General

Counsel for the Petitioners

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In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF THE PETITIONER

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record
wthro@oag.state.va.us

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General
smccullough@oag.state.va.us

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

December 28, 2007

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF THE PETITIONER

I. THE CONSTITUTIONAL STANDARD OF PROBABLE CAUSE OPERATES INDEPENDENTLY OF ANY ADDITIONAL PROTECTIONS PROVIDED BY THE STATES.

Respondent's central contention is that when a State enacts a law prohibiting arrest under specified circumstances, it disavows any governmental interest in an arrest under those circumstances, and such an arrest therefore violates the Fourth Amendment's reasonableness requirement. Contrary to that contention, the Fourth Amendment establishes an independent, uniform standard for when an arrest in a public place is reasonable – *i.e.*, when the arresting officer has probable cause to believe that an individual has committed a crime. States are free to impose additional restrictions on arrest that go beyond Fourth Amendment requirements and frequently do so, often for reasons unrelated to Fourth Amendment interests. But when States impose those additional state-law restrictions, for whatever reason, they do not change the Fourth Amendment calculus, and they do not trigger constitutionally-mandated remedies like the exclusionary rule.[1]

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[1] If the balancing required by the Fourth Amendment turns on governmental policy choices, the logical extension of Moore's argument calls into question the probable cause standard itself. For example, where a State has determined that

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Respondent's proposal to replace the uniform probable cause standard with a rule that Fourth Amendment protections would vary when a State, for its own policy reasons, affords greater protections would hand States the ability effectively to overrule numerous of this Court's decisions for in-state police conduct. If respondent's theory were correct, a State that enacted a law prohibiting pretextual arrests would effectively overrule *Whren v. United States*, 517 U.S. 806 (1996). A State that enacted a law requiring a warrant for a public arrest for some or all felonies would effectively overrule *United States v. Watson*, 423 U.S. 411 (1976). A State that limited officers to justifying an arrest based on the grounds given at the time of arrest would effectively overrule *Devenpeck v. Alford*, 543 U.S. 146 (2004). And a State that prohibited searches incident to arrest unless the arresting officer had specific grounds to believe that the offender presented a threat to the officer's safety or would destroy evidence would effectively overrule *United States v. Robinson*, 414 U.S. 218 (1973).

Such a system would make fundamental Fourth Amendment protections turn on the actions of the legislatures of the States and thus vary from place to place and from time to time. It would substitute for

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the apprehension of certain criminals, such as murderers or rapists, is of paramount significance, that heightened interest, under Moore's legislative choice balancing, would outweigh a suspect's interests so as to justify an arrest based on less than probable cause.

the uniform probable cause requirement held sufficient to protect against arbitrary police action in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), a new regime of 50 different Fourth Amendments. It would deter States from providing *any* such enhanced protections by depriving state legislatures of the ability to calibrate the remedies for such extra-constitutional protections, avoiding (as Virginia has) the heavy sanction of exclusion for state-law violations. And it is irreconcilable with this Court's repeated holdings that, although States are free as a matter of their own law to impose greater restrictions on police activity than those this Court has determined are required by the Fourth Amendment, they "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (quoting *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).

Respondent seeks to pare back his disruptive theory by arguing that it would not apply to restrictions on arrest authority that "have nothing to do with the Fourth Amendment's long-established weighing of the public interest served by a custodial arrest." Resp't Br. 39.[2] However, the respondent offers

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[2] At the same time that the respondent claims that courts can and must sift legislative purpose to separate those statutes that have, in his view, Fourth Amendment significance, from those that do not, the respondent also contends inconsistently that courts should not seek to "divine governmental purposes that the government itself denies." Resp't Br. 17. But even if

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no basis to determine which limitations on arrest reflect on a weighing of Fourth Amendment interests and which do not. Many of the state law restrictions that respondent contends would not be incorporated into the Fourth Amendment appear on their face to reflect some balancing of citizens' interests in privacy and liberty against the State's interests in making arrests and searches. Those restrictions include state law warrant requirements, state laws requiring a heightened standard of suspicion for arrest based upon information on an informant, state law limits on the type of officer authorized to arrest, state laws requiring a hearing before the occupant of a residence can be removed as a trespasser, and state laws requiring an opportunity to respond to a misdemeanor charge before process can be issued. *See* Pet'r Br. 36-42. Respondent confidently asserts that none of those restrictions reflects a State's balancing of Fourth Amendment interests, but he offers no explanation for that counterintuitive assertion.

Surely, this Court and other federal courts are not expected to ascertain the Fourth Amendment's protections by probing the legislative history of state law enactments – assuming such legislative history is even available for state statutes or regulations. And,

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such sifting is possible, the respondent cannot dispute that it would greatly complicate suppression hearings by requiring an examination of state statutes and regulations, as opposed to a straightforward assessment of the existence of probable cause.

even if the scope of the Fourth Amendment did depend on the motivations of state legislatures, determining whether a particular state restriction on arrest actually reflects a judgment that individual privacy and liberty interests outweigh the State's interest in making an arrest would be an impossible task. As respondent himself acknowledges, even state laws requiring citation in lieu of arrest "further other significant governmental interests" besides protection of individual privacy and liberty, such as conservation of police resources and the public fisc. Resp't Br. 15. There is thus no basis for the fundamental assumption underlying all of respondent's arguments – that Virginia's requirement of citation rather than arrest for respondent's offense reflects the State's judgment that individual privacy and liberty interests outweigh the State's interests in making an arrest.

Indeed, the Virginia statute requiring citation itself indicates that Virginia has concluded that there are numerous state interests that can justify an arrest for respondent's offense. The statute authorizes arrest if the offender fails or refuses to discontinue the offense, if the officer believes the offender is likely to disregard a summons, or if the officer reasonably believes the offender is likely to harm himself or others. *Virginia Code* § 19.2-74. And an officer may make an arrest for the offense in any jurisdiction where "prior judicial approval has been granted by order of the general district court," presumably because specific local conditions indicate that routine

custodial arrests are warranted. *Virginia Code* § 46.2-936. Thus, Virginia has determined that the State has an interest in making an arrest for a variety of reasons but it has chosen, as a matter of state policy, to require a case-by-case determination that those reasons are present before permitting its officers to make an arrest.

Virginia is free to require that case-by-case determination as a matter of state law. But this Court has held that the Fourth Amendment's reasonableness requirement does not demand that kind of case-by-case balancing of governmental and private interests before an officer may make an arrest. Instead, the probable cause standard "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Dunaway v. New York*, 442 U.S. 200, 208 (1979). The Fourth Amendment does not require a case-by-case determination of whether the State's interests in making an arrest outweigh the individual's privacy and liberty interests because Fourth Amendment requirements reflect the reality that *every* situation in which probable cause exists may implicate the interest in abating wrongdoing and ensuring compliance with process. The constitutional standard also incorporates the important interest in easily administrable rules governing police conduct. Virginia may, as a matter of state law, choose to give less weight than the Constitution to the importance

of administrable rules, but Virginia's choice does not change what the Fourth Amendment requires.[3]

Furthermore, legislative bodies lack "the power to determine what constitutes a constitutional violation," *City of Boerne v. Flores,* 521 U.S. 507, 519 (1997), and it is for the judiciary, ultimately, "'to say what the law is,'" *Sanchez-Llamas v. Oregon,* 126 S. Ct. 2669, 2684 (2006).[4] The rule advocated by respondent would render the policy judgments of governing bodies, the central, if not the determinative, factor in determining the constitutionality of many arrests and thus would effectively shift the role of assessing the propriety of an arrest from the judiciary to the legislative body.[5]

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[3] The logic of Moore's balancing would spill over into other areas of constitutional law where a State's interest is balanced against a private individual's interest. For example, the constitutional analysis of speedy trial involves a balancing of the State's interest in prosecuting a defendant with a defendant's interest in the prompt resolution of the charge. *See, e.g., United States v. Loud Hawk*, 474 U.S. 302, 313-14 (1986). If a State enacts a speedy trial statute, under Moore's balancing test, this state law policy choice would be imbued with constitutional significance.

[4] *See also Crowell v. Benson,* 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

[5] This does not mean that state legislature cannot determine that an arrest is unreasonable *as a matter of state law*. Except where limited by the State Constitution, a state legislature is free to create substantive rights that are greater

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Under the paradoxical guise of honoring federalism, the standard urged by Moore and his amici would significantly undermine the sovereign authority of the States to determine how to punish *state officers* who violate *state law*. The decision below conflates the authority of a State – as a matter of state law – to enact protections for its citizens that exceed the federal constitutional standard with the federal constitutional standard itself. *See Sullivan*, 532 U.S. at 772.

In every arrest, the government's interests include ensuring the presence of a suspect for trial, obtaining evidence of a crime, preventing future harm, providing certain social service functions, and maintaining proper respect for the law and the police. Those interests exist upon arrest whether or not the legislature chooses to restrict the authority of its police officers in certain situations, and to enforce those restrictions through the tort system. Conversely, an individual's interest in avoiding the intrusion of an arrest, from a federal constitutional standpoint, does not vary based on policy choices made by the state legislatures.

Furthermore, although Moore contends that his proposed balancing would honor the "desirability of

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than those guaranteed by the United States Constitution and state courts might conclude that their constitutions or statutes require suppression of evidence where the United States Constitution does not require suppression.

flexibility and experimentation" for state legislatures, Resp't Br. 19, his proposed rule would create a powerful disincentive for such flexibility and experimentation. Instead of permitting the States to choose how violations of state statutes by state officers should be punished, the States would face the "one size fits all" straightjacket of the exclusionary rule.

Ultimately, in assessing the constitutionality of an arrest under the Fourth Amendment, the balancing of interests should not turn on policy choices made by local governing bodies, state legislatures, or the United States Congress. Instead, "the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway*, 442 U.S. at 214.

II. RESPONDENT'S POSITION GAINS NO TRACTION FROM THE COMMON LAW OR THIS COURT'S JURISPRUDENCE.

A. The Common Law Affords Respondent No Support.

Respondent and his amici draw selective excerpts from common law principles in an effort to alter the constitutional standard. That attempt fails. "There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of

assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Atwater*, 532 U.S. at 339-40. Because the Bill of Rights originally did not apply to the States, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), it is difficult to see why venerable state cases assessing tort liability against officers who exceeded their bounds under state law should be infused with federal constitutional significance. Indeed, constitutionalizing state false arrest statutes runs counter to one of the most prominent arguments made by the Framers – that the new Constitution would preserve rather than eviscerate state sovereignty. *See, e.g.*, *The Federalist No. 32* at 165-66 (Alexander Hamilton); *The Federalist No. 45* at 256-62 (James Madison).[6] *Cf. The Federalist No. 51* at 291-93 (James Madison) (emphasizing the role of the States in curbing the National Government).

At common law, an officer could generally arrest without a warrant for misdemeanors "committed in the presence of the arresting officer." *Atwater*, 532 U.S. at 336.[7] The relevant standard here is the one in existence "when the [Fourth] Amendment was framed." *Florida v. White*, 526 U.S. 559, 563 (1999). Furthermore, while the historical record is "not

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[6] Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999).

[7] *See also* Jacob W. Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT 45 (1966).

unequivocal," the historical record shows "two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace." *Atwater*, 532 U.S. at 340. Thus, while the particularities of state law have and will continue to vary, the historical record does not support the proposition that a breach of these state laws amounts to a *constitutional* violation. Since the common law at the time of the Framing authorized an arrest for a misdemeanor that occurred in the officer's presence, the arrest here satisfied common law standards.[8]

The National Association of Criminal Defense Lawyers cite a number of older precedents from the courts of England and the States in support of the proposition that an arrest that violates state law strictures of arrest is unreasonable as a matter of federal constitutional law. At the heart of this

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[8] In eighteenth-century England, and in her fledgling colonies, a person wrongfully arrested did not enjoy many of the pre-trial procedural rights that an accused benefits from today. Once arrested, a detainee could be confined for an indefinite period, sometimes years, often in deplorable conditions. *See* Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 315 (1942). Under this Court's modern jurisprudence, to cite one example, an accused has the right to an arraignment within forty-eight hours. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). State laws often afford additional protections above the federal constitutional floor. *See Virginia Code* § 46.2-936 (providing for the "immediate" appearance of an arrestee before a magistrate).

argument lies a *non-sequitur*: that an action that is unreasonable under state law must *ipso facto* be unreasonable under the United States Constitution.

To the contrary, older cases in which an officer or a private party is sued in tort for violating a state statute regulating arrest authority actually support the argument that such strictures are a matter of state law rather than federal constitutional law.[9] Those decisions are devoid of any hints that an arrest made in violation of a state statute implicated state constitutional principles analogous to the Fourth Amendment or that such arrests violate some fundamental tenet of the common law. Instead, the decisions treat the illegal arrest as a straightforward

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[9] *See Elk v. United States*, 177 U.S. 529, 534-35 (1900) (discussing power of arrest in statutory rather than constitutional terms and noting common law pedigree of right of an officer to arrest for a misdemeanor committed in his presence). *See also Brock v. Stimson*, 108 Mass. 520 (1871) (holding that although arrest without a warrant for being drunk in public was proper, police chief was liable in trespass because, under state statute, the officer was required to release the individual rather than following through with a charge); *Phillips v. Fadden*, 125 Mass. 198 (1878) (same); *Delafoile v. New Jersey*, 24 A. 557 (N.J. 1892) (assessing tort liability against officially sanctioned private law-enforcement association for illegal trespass into an inn); *Phillips v. Trull*, 11 Johns. 486 (N.Y. 1814) (private person liable in tort for assault and false imprisonment because he could not arrest for breach of the peace after the affray had ended); *Lyons v. Worley*, 4 P.2d 2 (Okla. 1931) (arrest occurred following collision between automobile and horse team was illegal under state statute; the officer was, therefore, liable in tort for trespass because the misdemeanor traffic offense did not occur in the officer's presence).

matter of state statutory law, to be remedied as provided by the state legislature. This is precisely Virginia's position in the case at bar. Those decisions are entirely consistent with the notion that merely because an arrest is illegal and, therefore, unreasonable as a matter of *state law,* this does not render the arrest unreasonable from a constitutional standpoint.

An additional obstacle to the invocation of history is the fact that the Framers "did not equate an officer's misconduct with government illegality; rather they perceived only personal misconduct when an officer exceeded his official authority. Hence, misconduct by an ordinary officer could not constitute an 'unconstitutional' government act." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 660 (1999). The remedy for an unlawful arrest at common law was a civil action for money damages. *See Payton v. New York*, 445 U.S. 573, 592 (1980). That is exactly what Virginia law provides. Virginia's statutory scheme is entirely faithful to common law traditions.[10]

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[10] The exclusionary rule, in contrast, was adopted a hundred and twenty-five years after the adoption of the Fourth Amendment. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952-53 (1965).

B. This Court's Jurisprudence Affords Moore No Support.

1. This Court Has Never Infused State Laws Governing Arrests With Constitutional Significance.

Moore erroneously contends that this Court has previously settled the issue. That assertion is simply wrong. Despite more than two hundred years of jurisprudence, Moore cites only two cases in support of his argument. Neither case supports his view. In *Johnson v. United States*, 333 U.S. 10 (1948), a federal prosecution, the Court relied on *United States v. Di Re*, 332 U.S. 581 (1948) for the proposition that "[s]tate law determines the validity of arrests without warrant." *Johnson*, 333 U.S. at 15 n.5.

As explained in Virginia's opening brief, *Di Re* announced a prudential doctrine based on federal statutory law to govern arrests made by federal officers. *Di Re* did not purport to expand the constitutional standard governing arrests. *See* Pet'r Br. at 32-33. Similarly, as noted in Virginia's Opening Brief, *Michigan v. DeFillippo*, 443 U.S. 31 (1979) affords the defendant no support. Pet'r Br. at 35. The reference to state law in that case was clearly dictum, because the defendant did not challenge the validity of his arrest. *Id.* at 36. Moreover, because state law defines what constitutes a crime, the propriety of an arrest, in that limited sense, rests on a foundation of state law.

The ACLU, as amicus, attempts to marshal *Ker v. California*, 374 U.S. 23 (1963) in support of an argument that state laws are dispositive of the constitutional standard for arrests. ACLU Amicus at 7. At issue in *Ker* was the propriety of a warrantless entry into an apartment, where the police found marijuana. *Id.* at 28-29. In assessing the arrest proper, as opposed to the entry into the home without a warrant, a plurality of the Court noted that "[t]he lawfulness of an arrest without warrant, in turn, must be based upon probable cause." *Id.* at 34-35. The Court concluded that probable cause was present. *Id.* at 37.

The Court then turned to the question whether the "method of entry" into the home rendered the arrests unconstitutional, notwithstanding the presence of probable cause. *Id.* at 37. During this portion of the analysis, the Court, citing *Di Re* and *Johnson*, noted that "the lawfulness of federal offenses is to be determined by reference to state law insofar as it is not violative of the federal constitution. . . . A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law." *Ker*, 374 U.S. at 38. This discussion did not occur in the context of the arrest proper, but rather of the warrantless entry into the apartment. In effect, the plurality opinion anticipated subsequent decisions involving warrantless entries into the home. Such entries implicate an intrusion different in scope from an arrest in a public place and accordingly, the analysis differs. *See Payton*, 445 U.S.

at 585-89; *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1994). The plurality opinion ultimately concluded that the entry in *Ker* satisfied state law and, in addition, satisfied the federal standard because exigent circumstances supported the entry. *Ker*, 374 U.S. at 40-41. At any rate, because the warrantless entry into the apartment complied with California law, any statement regarding state law is dictum. *Id.*

With respect to the arrest itself, rather than the entry into the home, the plurality opinion in *Ker* supports Virginia's argument that an arrest based on probable cause is constitutional. *Ker* also stressed that "*Mapp* sounded no death knell for our federalism." *Id.* at 31. The Court held that so long as States respected the "fundamental – *i.e.*, constitutional – criteria established by this Court," the States were free to "develop[ ] workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States." *Id.* at 34. *Ker* thus affirms the promise of federalism and the independence of state policy judgments.

2. The Respondent Fails to Distinguish Cases That Affirm the Independence of the Federal Constitutional Standard from a State's Grant of Additional Protections.

Respondent does not even address *Elkins v. United States*, 364 U.S. 206 (1960). *Elkins* cannot be reconciled with respondent's theory because it holds that the constitutionality of search under the Fourth Amendment is a question of "federal law, neither enlarged by what one state court might have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 224.

Respondent's distinction of *Greenwood* is unconvincing. The search of the defendant's trash in *Greenwood* was prohibited by California law. *California v. Greenwood*, 486 U.S. 35, 43 (1988). Under respondent's "disavowal of any significant governmental interest theory," California had therefore disavowed any government interest in undertaking the search, and the search could not be reasonable under the Fourth Amendment. Yet the Court held that the search was permissible under the Fourth Amendment, and it expressly rejected the proposition that "whether or not a search is reasonable under the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.* The only way to reconcile *Greenwood* with respondent's theory would be to adopt a different rule for seizures than for searches. Respondent has made no effort to justify such differential treatment and there is no possible justification.

Cooper v. California, 386 U.S. 58 (1967), is also inconsistent with respondent's theory. *Cooper* clearly held that the search of Cooper's car was reasonable under the Fourth Amendment even though the state court had held that the search was not authorized by state law. 386 U.S. at 60-61. That holding is inconsistent with respondent's "disavowal of any Fourth Amendment interest" theory for the same reason that *Greenwood* is inconsistent with his theory. Also irreconcilable with respondent's theory is the Court's statement in *Cooper* that the State had the "power to impose higher standards on searches and seizures than required by the Federal Constitution" and "when such state standards alone are violated, the State is free, without review by [the Supreme Court], to apply its own state harmless-error rule to such errors of state law." *Id.* at 62. Under respondent's theory, a higher state standard necessarily raises the Fourth Amendment standard, so there can be no violation of the state standard alone.

It is true that, in explaining why the seizure in *Cooper* was reasonable, the Court noted that the police were required by state law to seize the car, and reasoned that the search was therefore reasonable for police protection purposes. 386 U.S. at 61. But the Court did *not* hold that either the search or the seizure would have been unconstitutional if state law had not required the seizure. In fact, both the search and the seizure would have been constitutional. The police could still constitutionally have seized the car as evidence of the defendant's narcotics offense,

because the "evidence showed" that the car "had been used to carry on his narcotics possession and transportation." *Id.* at 60. And, under the Court's reasoning in *Cooper*, once the car was permissibly seized, the police could have searched it "for their own protection." *Id.* at 61. The police also could constitutionally have searched the car under the automobile exception to the warrant requirement because, given respondent's use of the car in his drug business, they had probable cause to believe that it contained narcotics (which it in fact did).

Whren is also inconsistent with respondent's theory. Respondent inaccurately states that "the Court in *Whren* merely held that the right to stop the vehicle was not undercut by *local police practices*." Resp't Br. 50. In fact, the stop of the vehicle was not merely contrary to local police *practices* but prohibited by "District of Columbia police *regulations*." 517 U.S. at 815 (emphasis added). Those regulations permitted the officers at issue to make the traffic stop "only in the case of a violation that is so grave as to pose an *immediate threat* to the same of others." *Id.* (quoting the D.C. regulations). The D.C. regulations in *Whren* thus embodied precisely the kind of balancing of Fourth Amendment interests that respondent contends is reflected in the Virginia law at issue here. Moreover, (under respondent's theory) they reflected a determination by the District that, on balance, the government did not have an interest in making the stop. *See id.* at 816-817 (noting that the defendant in *Whren* was making that very argument). But the Court held that

the mere fact that the regulations prohibited the stop did not render the stop unconstitutional under the Fourth Amendment. *Id.* at 815. The Court also expressly rejected the argument that a case-by-case balancing of interests was appropriate, instead reaffirming "the traditional common law rule that probable cause justifies a search or seizure." *Id.* at 819.

Furthermore, contrary to Moore's suggestion, Virginia does not contend that the Fourth Amendment, in all circumstances, operates in a vacuum that is free of state law considerations. State law is determinative as to whether an offense has been committed. However, once the police obtain, from an objective standpoint, probable cause to believe an individual has committed a crime, the constitutional balance of interests renders the *arrest* reasonable as a matter of federal constitutional law. In other words, the standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Dunaway*, 442 U.S. at 208.[11]

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[11] Other situations contemplated by the Fourth Amendment may require a different balancing than that required for an arrest. For example, governmental intrusions into the home, *Welsh*, 466 U.S. at 753, or the use of deadly force, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), implicate different and heightened concerns from a garden variety arrest and, therefore, the analysis proceeds differently. *See Whren*, 517 U.S. at 817-18 (while other areas protected by the Fourth Amendment require balancing, no further balancing is required for an arrest if it is based on probable cause).

The ACLU contends that in numerous contexts, constitutional protections vary depending on state law. Amicus Br. 13-15. For example, the ACLU notes that in due process and takings jurisprudence, State law defines the underlying property interest and federal law then defines the procedures that must attend a deprivation of that interest. The ACLU argues that this is analogous to allowing Fourth Amendment reasonableness to turn on a State's decision to limit the category of "arrestable" offenses. Virginia noted in its opening brief that State law is relevant under the Fourth Amendment because state law defines the conduct that may violate the law and federal law then defines the appropriate standard, *e.g.*, probable cause, that justifies an arrest. This is similar, Virginia noted, to the standard articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979) in assessing the sufficiency of the evidence. State law defines the elements of an offense and federal law then defines the standard of proof to establish them (*i.e.*, beyond a reasonable doubt). The same point applies to due process and takings cases: state law defines the property interest, but federal law defines the *process* by which those interests may be affected by state action. *See, e.g.*, *State Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing due process protections for employment); *Philips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (discussing "takings" of property). A State's decision to afford *more* process to protect a particular property right would not mean that *due process* automatically required the State to afford that process as a matter of Fifth Amendment law. Likewise,

a State's decision to impose additional strictures on arrests does not mean those strictures must be imposed as a matter of Fourth Amendment law.[12]

Virginia cited many cases in its opening brief in which this Court held that an arrest is reasonable under the constitution if it is based on probable cause.[13] The respondent notes that in these cases, the arrest was authorized by state law. Resp't Br. 36-37 and n.9. However, it is noteworthy that in repeatedly reaffirming the constitutional validity of an arrest based on probable cause, the Court has not incorporated into its analysis the longstanding strictures imposed under state law on the authority of state officers to arrest. This silence is hard to square with a jurisprudence that would ascribe a potentially dispositive role to state law in this area and with the fact that state law strictures on the arrest authority

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[12] The same is true in the Double Jeopardy context, where state law defines the elements of the crime but the constitutional Double Jeopardy standard independently determines whether a prosecution violates federal guarantees. If a State were to afford defendants additional protections in this area, for example by precluding a state prosecution when the defendant has been prosecuted for the same conduct by the federal government or another state, *United States v. Wheeler*, 435 U.S. 313 (1978) (discussing dual sovereignty doctrine and Double Jeopardy), those additional protections would not acquire constitutional magnitude. *See, e.g., Virginia Code* § 19.2-294 (precluding separate prosecutions based on the "same act").

[13] *See Devenpeck*, 543 U.S. at 152; *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *Whren*, 517 U.S. at 817; *Watson*, 423 U.S. at 415-17 (1976); *Robinson*, 414 U.S. at 235.

of constables and police officers have been in place from the very dawn of the Colonial era until the present time.

III. RE-AFFIRMING THE CONSTITUTIONAL VALIDITY OF AN ARREST BASED ON PROBABLE CAUSE WILL NOT PROVIDE CARTE BLANCHE FOR THE POLICE TO ARREST CITIZENS AT WILL.

Moore attempts to raise the specter of "the potential for abuse of the search power" under the probable cause standard. Resp't Br. 24. He goes so far as to contend that "opportunities for custodial arrest will be almost limitless." Resp't Br. 24.[14] The argument is without merit.

First, officers are constrained by the constitutional requirement of probable cause. Any evidence seized pursuant to an arrest that is not based on probable cause will be suppressed as a matter of federal constitutional law. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). This "long-prevailing standard[ ]" of probable cause represents "the best compromise that has been found for accommodating [the] often opposing interests" of the government and

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[14] Moore highlights the fact that the police did not take him to a police station for booking but instead drove him to his hotel room and searched him there, along with a search of his hotel room. Resp't Br. 24. However, the search of Moore's hotel room was based on his consent, J.A. 43-44, a fact that Moore did not challenge in state court.

a private citizen. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). In this case, the existence of probable cause to believe Moore committed a crime, one punishable by up to one year in jail, supplied the *constitutionally* required objective basis for the arrest. Nothing more is required.

Second, "it is in the interest of police to limit petty-offense arrests." *Atwater*, 532 U.S. at 352. As a result, this Court observed "a dearth of horribles demanding redress." *Id.* at 353. If the constitutional probable cause standard has worked well and if there is no broader problem of any significance to address, the existing standard of probable cause should be reaffirmed rather than dramatically altered.

Third, police officers who violate state laws governing arrests expose themselves to the sanctions provided under state law.[15] If these remedies prove inadequate – and the paucity of cases alleging violations of the misdemeanor-summons statutes suggests that they are not – Virginia's General Assembly can enact still more protections. Moreover,

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[15] Moore stresses the testimony of one of the arresting officers that he believed it was his "prerogative" to make an arrest. J.A. 15. To the extent the officer's testimony can be construed as an assertion that Virginia officers are free to ignore Virginia law, the officer is wrong. A Virginia officer who violates *Virginia Code* § 19.2-74 risks a lawsuit for false arrest, *Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1988), incurs the possibility that the suspect will exercise his right to resist an illegal arrest, *Virginia v. Hill*, 570 S.E.2d 805, 808 (Va. 2002), and even risks outright dismissal from the force. *See Virginia Code* § 46.2-936.

imposing the drastic remedy of exclusion as a matter of federal constitutional law would create powerful disincentives for the States to impose limitations on police arrest authority, and could encourage some States to repeal existing protections. Moore's hyperbole regarding the potential for limitless abuse of police power is simply groundless.

At present, the bright-line rule of probable cause is well established and straightforward. If, as the Court noted in *Atwater*, warrantless misdemeanor arrests do not amount to a problem of any significance[16] – and misdemeanor arrests that violate state law would be an even smaller subset of that group – there is no reason to forsake a clear, simple, settled standard in favor of a more complex, uncertain standard. Rather than imposing a federal constitutional remedy for a problem of state law, this Court should allow the States to decide how violations of state law by state officers should be punished. States have done so before the United States Constitution was even considered, and States should be allowed to continue to exercise this sovereign prerogative. Affirming the ongoing validity of the probable cause standard without extending the federal constitutional remedy to state law strictures on arrest is not only the choice most in harmony with our constitutional system of dual sovereignty, it is also the soundest choice from a jurisprudential standpoint.

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[16] 532 U.S. at 353.

CONCLUSION

For the reasons above, those noted in the Brief, and in the Amici Briefs of the United States and the States, the Court should **REVERSE** the judgment below.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

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No. 06-1082

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF TEXAS, ARKANSAS, COLORADO, IDAHO, IOWA, MAINE, MICHIGAN, NEW HAMPSHIRE, OREGON, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WYOMING AS *AMICI CURIAE* ON BEHALF OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

SUSANNA DOKUPIL
Assistant Solicitor General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*
[Additional counsel listed on inside of cover]

DUSTIN MCDANIEL
Attorney General for Arkansas

JOHN W. SUTHERS
Attorney General for Colorado

LAWRENCE G. WASDEN
Attorney General for Idaho

TOM MILLER
Attorney General for Iowa

STEVEN ROWE
Attorney General for Maine

MICHAEL A. COX
Attorney General for Michigan

KELLY A. AYOTTE
Attorney General for New Hampshire

HARDY MYERS
Attorney General for Oregon

ROBERTO A. SÁNCHEZ-RAMOS
Secretary of Justice for Puerto Rico

HENRY MCMASTER
Attorney General for South Carolina

LAWRENCE E. LONG
Attorney General for South Dakota

MARK L. SHURTLEFF
Attorney General for Utah

PATRICK J. CRANK
Attorney General of Wyoming

QUESTION PRESENTED

Does the United States Constitution require the suppression of evidence obtained when a police officer makes an arrest based upon probable cause, if the arrest violates a provision of state law?

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INTEREST OF AMICI

The *amici* States appear as *amici curiae* in support of Petitioner, Commonwealth of Virginia. SUP. CT. R. 37.4.

The *amici* States have a significant interest in this case because each State has the authority to regulate its own law enforcement, so long as its laws comply with the federal Constitution. Although States may individually choose to go beyond the federal Constitution's requirements for regulating searches, seizures, and arrests, the *amici* States all have an interest in a clear articulation of their ability to determine their own penalties for such regulations.

SUMMARY OF ARGUMENT

This case concerns the States' authority to regulate arrests and their corresponding responsibility to define their own remedies. The overwhelming majority of state supreme courts and federal circuit courts to consider the issue have concluded that, where an officer has probable cause to arrest but violates some provision of state law in making that arrest, any state-law illegality does not implicate the federal Constitution. The Supreme Court of Virginia in the opinion below joined the Ninth and District of Columbia Circuits in finding that state law forms a basis for determining the reach of the Fourth Amendment—when state law is violated, the minority rule holds that the federal Constitution itself provides the remedy. This case presents a serious conflict among the lower courts that should be resolved.

ARGUMENT

I. THE COURT HAS NOT DECIDED WHETHER A VIOLATION OF STATE—NOT FEDERAL—LAW REGULATING ARRESTS RENDERS AN OTHERWISE-LAWFUL SEARCH INCIDENT TO THAT ARREST UNCONSTITUTIONAL.

The Court has clearly stated that the Fourth Amendment allows a search incident to a lawful arrest and that the Constitution—not state law—determines the reasonableness of a search; the Court has not, however, addressed whether a violation of a mere state-law rule requires a remedy rooted in the federal Constitution. As a result, a conflict has developed in the lower courts.

The Court has also held that when state law creates greater protections than those afforded by the federal Constitution, those protections are a matter of state law, not federal law. *Arkansas* v. *Sullivan* explained that, "while a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards, it may not impose such greater restrictions *as a matter of federal constitutional law* when this Court specifically refrains from imposing them." 532 U.S. 769, 772 (2001) (per curiam) (quoting *Oregon* v. *Haas*, 420 U.S. 714, 719 (1975)) (internal quotation marks omitted) (emphasis in original).

Moreover, state-law authorization for police activity is not by itself determinative of that activity's constitutionality: "Just as a search authorized by state law may be justified as a constitutionally reasonable one under [the Fourth A]mendment, so may a search not expressly authorized by state law be justified as a

constitutionally reasonable one." *Cooper* v. *California*, 386 U.S. 58, 61(1967). Indeed, "when such state standards [imposing higher standards than required by the federal Constitution] alone have been violated, the State is free, without review by us, to apply its own state . . . rule to such errors of state law." *Id.*, at 62 (emphasis added). Therefore, the relevant federal question is not whether the search violated state law, but whether the search was constitutionally reasonable in and of itself.

A search incident to an arrest based on probable cause is plainly constitutional under the Fourth Amendment. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest *requires no additional justification* ." *United States* v. *Robinson*, 414 U.S. 218, 235 (1973) (emphasis added);[1] *Commonwealth* v. *Moore*, 622 S.E.2d 253, 259 (Va. App. 2005) (en banc); *see also Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979) ("The fact of a lawful arrest, standing alone, authorizes a search.").

To be sure, *Knowles* v. *Iowa*, 525 U.S. 113 (1998), found that a search of a car incident to a traffic stop for speeding was not constitutional under the *Robinson* rule. *Id.*, at 114. But *Knowles* does not address the question at issue here. Although the Iowa statute, as interpreted by Iowa courts, clearly authorized a full search incident to a traffic citation, Knowles was not in fact under arrest at

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1. Although *Robinson* specifically declined to address whether a search incident to a traffic citation would be appropriate, 414 U.S., at 237 n.6, Moore was under arrest when the search in question occurred.

the time of the search—he was arrested afterwards. *Id.*, at 116-18. The *Knowles* Court found that a traffic citation could not support a full incident search in the same way that a custodial arrest would have done. *See id.*, at 116-18. But in the instant case, police—rightly or wrongly—had already placed Moore under arrest before the challenged search occurred. *Commonwealth* v. *Moore*, 636 S.E.2d 395, 396 (Va. 2006). Thus, *Knowles* is not on point. *Knowles* addresses only the constitutionality of a full search incident to a mere traffic citation—not a search incident to arrest as at issue here.

Moreover, in *Atwater* v. *City of Lago Vista*, 532 U.S. 318 (2001), this Court upheld a statute that allowed a warrantless arrest for a misdemeanor in an instance in which officers had probable cause. *Id.*, at 325-26, 354. Significantly, the *Atwater* Court noted that "[i]f an officer has probable cause to believe that an individual has committed even a very minor offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.*, at 354. In *Moore*, precisely such a belief caused the officer to arrest Moore—police suspected he was driving with a suspended license. *Moore*, 636 S.E.2d, at 396. Thus, the very type of arrest that violated Virginia law in *Moore* was constitutional in *Atwater*. Although *Atwater* was silent as to whether a search incident to that arrest would be constitutional, the *Robinson* rule indicates that if the arrest was constitutional, the search would be likewise constitutional. *Cf. DeFillippo*, 443 U.S., at 40 (declining to suppress evidence obtained in a search

pursuant to an arrest under an ordinance that was later found unconstitutional).[2]

Thus, this Court has never directly decided the question of whether the Constitution requires suppression when an officer has probable cause to arrest, yet the arrest violates a state law. Lower courts would benefit from that clarification.

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2. *DeFillippo* noted in dictum that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." 443 U.S., at 36. Yet *DeFillippo* did not present the question of an arrest pursuant to a state-law violation. *Id.*, at 36 ("Respondent does not contend . . . that the arrest was not authorized by Michigan law."). Rather, the case turned on the presence of probable cause, which is not disputed here. *Id.*, at 37-40. Similarly, *United States* v. *Di Re*, 332 U.S. 581, 593-95 (1948), suppressed the fruits of a search incident to an arrest that violated a New York statute, but that case has since been implicitly overruled. The Court has later squarely held that state-law authorization to arrest is not the determining factor for constitutional reasonableness. *See California* v. *Greenwood*, 486 U.S. 35, 43-44 (1988) (rejecting the proposition that "concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment" and refusing to suppress evidence from a search that was reasonable under federal law but violated state law because the Court had "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs"); *Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960) (implicitly overruling *Di Re* by holding that "[t]he test [for admissibility of evidence] is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed").

II. THE MAJORITY OF STATE SUPREME COURTS AND FEDERAL CIRCUIT COURTS THAT HAVE CONSIDERED THIS QUESTION HAVE CONCLUDED THAT STATES CANNOT CREATE A FOURTH-AMENDMENT VIOLATION THROUGH STATE ARREST REGULATION.

A. State Supreme Courts in California, Colorado, Maine, Michigan, Nevada, North Carolina, and Ohio Have Deferred to Federal Constitutional Law to Define Fourth Amendment Rights.

The Supreme Court of Virginia stands alone among state supreme courts. It concluded in *Moore* that, because the arrest violated state law, it negated the existence of the probable cause to the arrest that allowed the search. *Moore*, 636 S.E.2d, at 400. In short, Virginia's highest court found that a state-law violation created a constitutional infirmity under the Fourth Amendment.

Every other state supreme court to address the question has agreed that the federal, not state, law defines the contours of the Fourth Amendment. The California Supreme Court in *California* v. *McKay*, 41 P.3d 59 (Cal. 2002), addressed precisely the question at issue in *Moore*, yet it reached the opposite conclusion. There, an officer stopped a bicyclist for an infraction of the state vehicle code, placed him under arrest—allegedly in violation of California law—and searched the cyclist incident to that arrest, finding methamphetamine. *Id.*, at 53. That court recognized that *Atwater* foreclosed the defendant's contention that the arrest violated the Fourth Amendment. *Id.*, at 63-64. But, unlike the Virginia Supreme Court, the California Supreme Court concluded

that a violation of state law in effectuating that arrest did not render that arrest illegal under the federal Constitution. *Id.*, at 65-66 ("Our determination of the validity of the search under the federal Constitution thus does not depend on whether it was authorized by state law or the law of the particular State in which the search occurs. . . . [T]he test is one of federal law . . . .") (internal citations omitted).[3]

Other state supreme courts have agreed—in the absence of any state constitutional protection that goes further than the Fourth Amendment—that when an arrest violates state law but not the federal Constitution, no exclusionary remedy is necessary. *See, e.g.*, *Colorado* v. *Hamilton*, 666 P.2d 152, 156-57 (Colo. 1983) (finding that an arrest for probable cause that violated a state statute did not violate defendant's constitutional rights under the state or federal Constitution and concluding that arrests that exceeded an officer's statutory authority were "not *per se* violations of constitutionally protected rights"); *Maine* v. *Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (refusing to apply a *per se* rule that evidence obtained from an arrest that violated statutory jurisdictional boundaries would require application of the exclusionary rule); *Michigan* v. *Hamilton*, 638 N.W.2d 92, 96 (Mich.) (per curiam), *overruled on other grounds by Bright* v. *Ailshie*, 641 N.W.2d 587, 590 n.5 (Mich. 2002) (reasoning that "[t]he Fourth Amendment exclusionary rule only applies to constitutionally invalid arrests, not merely statutorily illegal arrests" and concluding that state statutory law did

---

3. The California Supreme Court ultimately found that the arrest did not, in fact, violate state law as alleged. *Id.*, at 72.

not require suppression of the evidence); *North Carolina* v. *Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973) (distinguishing, in the context of an arrest for a traffic stop that violated North Carolina law, between an "illegal" arrest and an "unconstitutional" arrest and holding that "nothing in our law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal . . . ."); *Ohio* v. *Droste*, 697 N.E.2d 620, 623 (Ohio 1998) (examining a traffic stop in which officers exceeded statutory authority and concluding that "absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule").

Indeed, the Nevada Supreme Court followed this reasoning even when its state constitution, not the federal Constitution, provided the exclusionary remedy. In *Nevada* v. *Bayard*, 71 P.3d 498 (Nev. 2003) (per curiam), an officer arrested Bayard for violating traffic ordinances and found illegal drugs on his person in a search incident to that arrest. *Id.*, at 500. The arrest, as in *Moore*, violated state law because the officer abused his discretion in declining to issue a citation under the circumstances. *Id.*, at 503. *Bayard* held that suppression of the evidence was appropriate under the Nevada Constitution, yet it still found that the arrest was legal under the Fourth Amendment. *Id.*, at 502-03; *see also Oregon* v. *Rodriguez*, 854 P.2d 399, 409 (Or. 1993) (holding that even if an arrest were invalid under the Oregon Constitution, "[b]ecause the arrest in this case did not violate the Fourth Amendment, the guns discovered in the subsequent

consent search were not subject to suppression under the Fourth Amendment").[4]

In each of these cases, state supreme courts declined to elevate their respective States' regulations to the level of federal constitutional law. This approach is consistent with that employed by the majority of federal circuit courts.

B. The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits Have All Refused to Allow State-Law Violations to Render Illegal Otherwise-Lawful Conduct Under Federal Law.

The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all held that when an officer has probable cause to believe a violation of the law has occurred and makes an arrest, the constitutionality of the arrest does not depend on compliance with state law that extends beyond what the Constitution requires. Although these cases involve a broad spectrum of arrests, the principle remains the same: A violation of state-arrest law does not create a violation of the Fourth Amendment.

The Eighth Circuit has reached this result in a case factually similar to *Moore*. In *United States* v. *Bell*, 54 F.3d 502 (CA8 1995), officers arrested Bell for operating a bicycle without a headlight. *Id.*, at 503. Searching him incident to the arrest, the officers found cocaine. *Id.*

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4. *See also New Mexico* v. *Bricker*, 134 P.3d 800, 801-05 (N.M. App. 2006) (finding an arrest that violated state law reasonable under the Fourth Amendment but unconstitutional under the New Mexico Constitution).

Although Bell's arrest violated Iowa law, which allowed only a citation for the offense, the court declined to exclude the evidence because it did "not think Fourth Amendment analysis requires reference to an arrest's legality under state law." *Id.*, at 504.

In examining the question of whether evidence discovered incident to a search illegal under state law must be suppressed under the Fourth Amendment, the Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have each held that a state-law violation alone does not render an arrest or search incident to it unconstitutional. In *United States* v. *Van Metre*, 150 F.3d 339 (CA4 1998), the Fourth Circuit reasoned "[t]hat [whether] an arrest may or may not have been conducted in accordance with . . . state law is irrelevant to our analysis," and declined to "import[] the particularized requirements of state standards . . . ." where the constitutional requirements for arrest warrants were otherwise met. *Id.*, at 347-48. Similarly, the Fifth Circuit found that "the proper inquiry in determining whether to exclude the evidence at issue [in a federal prosecution for possession of methamphetamine for intent to distribute] is not whether the state officials' actions in arresting him were 'lawful' or 'valid under state law.' The question . . . is whether the actions of the state officials in securing the evidence violated the Fourth Amendment." *United States* v. *Walker*, 960 F.2d 409, 415 (CA5 1992) (refusing to exclude evidence where police had probable cause to arrest). *See also United States* v. *Wright*, 16 F.3d 1429 (CA6 1994) (refusing to exclude evidence found in a search incident to an arrest based on probable cause and lawful under the Fourth Amendment, even though Tennessee law exceeded federal constitutional protections).

The Eighth Circuit reaffirmed its approach in *United States* v. *Lewis*, declining to suppress evidence of crack cocaine possession obtained in a search incident to a citation for loitering. 183 F.3d 791, 791 (CA8 1999). Although the arrest violated a Minnesota statute, the court believed that "the appropriate inquiry here [was] not whether Lewis's arrest was valid under Minnesota's criminal procedure statute, but rather under federal law." *Id.*, at 794. Under federal law, the court upheld the arrest and search. *Id.*

The Tenth Circuit also found, when considering a suppression claim based on a state-law flaw in a search warrant, that a state-law violation "is irrelevant as long as the standards developed under the Federal Constitution were not offended." *United States* v. *Le*, 173 F.3d 1258, 1265 (CA10 1999) (quoting *Wright*, 16 F.3d, at 1437).

Although each of these cases involved prosecutions under federal, not State, law, their respective courts' refusal to allow state law to define federal rights still conflicts with the analysis employed by the Virginia Supreme Court and the Ninth Circuit.

In the context of a § 1983 claim, seeking recompense for an allegedly illegal search, the First, Third, Fourth, Seventh, Eighth, and Eleventh Circuits all found state law not to be controlling in defining the alleged constitutional violation. The First Circuit found in *Vargas-Badillo* v. *Diaz-Torres*, 114 F.3d 3, 6 (CA1 1997), that a violation of state law cannot support a claim for illegal arrest under § 1983. It was not disputed that the officers had probable cause to arrest, *id.*, at 5, or that the officers violated a Puerto Rico Rule of Criminal Procedure, *id.*, at 6, but the

First Circuit reasoned that "[m]ere violations of state law do not, of course, create constitutional claims." *Id.*

Similarly, the Third Circuit directly rejected the idea that state law controls the validity of an arrest. In *Anderson* v. *Haas*, 341 F.2d 497 (CA3 1965), the court declared that "[i]t is immaterial whether [the officer's] conduct is legal or illegal as a matter of state law. Here, the plaintiff's claim is based upon an alleged violation of his rights under the Constitution of the United States, and we must look to Federal law to determine whether such violation occurred." *Id.*, at 499. The Fourth Circuit agreed. *Street* v. *Surdyka*, 492 F.2d 368, 371-72 (CA4 1974) (noting that, in a § 1983 action, an officer cannot be liable for a violation of state arrest law "unless he also violated the federal constitutional law governing warrantless arrests" and finding that "[t]he states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right").

The Seventh Circuit reached a similar result when considering a failure to provide a state-required hearing, noting that where an officer "followed the procedures the Constitution prescribes for making arrests, his failure to afford . . . additional procedures established by state law does not matter—not, at least, to a claim under the [F]ourth [A]mendment and § 1983 . . . ." *Gordon* v. *Degelman*, 29 F.3d 295, 301 (CA7 1994); *see also Pasiewicz* v. *Lake County Forest Preserve*, 270 F.3d 520, 526 (CA7 2001) (declining to decide whether an officer's arrest exceeded his state statutory jurisdiction because the state-law violation was not determinative of the constitutional question of the lawfulness of the arrest).

The Eighth Circuit echoed that consensus in *Abbott* v. *City of Crocker*, 30 F.3d 994, 997 (CA8 1994), noting that "[c]onduct by a government official that violates some state statutory or administrative provision is not necessarily constitutionally unreasonable." Although the Eighth Circuit recognized that state law might be relevant to determining whether police conduct was reasonable, it maintained that "evidence seized by state officers in conformity with the Fourth Amendment will not be suppressed in a federal prosecution because *state* law was violated." *Id.*, at 998 (internal citations and quotation marks omitted) (emphasis in original).

Finally, in *Knight* v. *Jacobson*, 300 F.3d 1272 (CA11 2002), the Eleventh Circuit declined to use a violation of a state statute to define a § 1983 action. Knight claimed that his arrest, even if supported by probable cause, violated the Fourth Amendment because Florida law authorizes warrantless arrests only for misdemeanors committed in the officer's presence (his was not). *Id.*, at 1275-76. The Eleventh Circuit held that federal law, not state law, determines a § 1983 violation. *Id.*, at 1276.

Together, these state supreme court and federal circuit decisions demonstrate that the great weight of judicial opinion among the lower courts looks to federal constitutional law, rather than state law, to determine the scope of the Fourth Amendment.

C. The Ninth Circuit, the District of Columbia Circuit, and the Virginia Supreme Court Conflict with the Majority, Holding That State-Law Violations Create Fourth Amendment Violations.

The Supreme Court of Virginia reached the opposite result. Rather than looking to federal law to define federal constitutional rights, the *Moore* decision found that a state-law violation created a constitutional infirmity under the Fourth Amendment. *Moore*, 636 S.E.2d, at 400. The court reasoned that the illegality of the arrest under state law also negated the existence of probable cause in the first place. *Id.* As a result, the court concluded that the evidence must be suppressed under the Fourth Amendment—even though it was obtained in a search incident to an arrest based on *constitutionally* sufficient probable cause—simply because that arrest violated state law. *Moore*, 636 S.E.2d, at 400. Thus, according to the Supreme Court of Virginia, an unlawful arrest under state law, probable cause notwithstanding, requires not a state-crafted remedy, but a federal constitutional solution.

Only the Ninth Circuit, the District of Columbia Circuit, and the Virginia Supreme Court have adopted this position. In *United States* v. *Mota*, 982 F.2d 1384 (CA9 1993), officers arrested the Mota brothers for operating a food cart without a license, and a search incident to arrest revealed counterfeit bills. *Id.*, at 1385. The *Mota* court reasoned that the legality of the arrest and subsequent search turned on state law. *Id.*, at 1387-88. That court recognized that the application of the exclusionary rule in federal court is a matter of federal,

not state, law, but it found that federal courts must consider state law in determining the lawfulness of the search. *Id.*, at 1397 (citing *DeFillippo*, 443 U.S., at 36 (noting that authority to arrest depends "in the first instance, on state law"), and *Di Re*, 332 U.S. 581 (finding a search incident to arrest unlawful where arresting officers lacked authority to arrest under state law)). There—as in *Moore*—an officer had cause to believe that the offenders had broken the law in his presence, yet—again as in *Moore*—state law prohibited police from effectuating a custodial arrest for the offense. *Mota* held that because the arrest violated state law, it was both unreasonable and unlawful under the Fourth Amendment of the United States Constitution. 982 F.2d, at 1389. Thus, *Mota* declared that the evidence found incident to that unlawful search must be suppressed. *Id.*[5]

Similarly, in *Barnett* v. *United States*, 525 A.2d 197 (CADC 1987), the District of Columbia Circuit found that the arrest and search of a pedestrian violating a walking regulation was constitutionally unreasonable. The traffic regulation was a civil infraction for which only a monetary

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5. The extant circuit split is resilient and unlikely to resolve without the Court's intervention. Indeed, the Ninth Circuit recently reaffirmed *Mota*'s holding. *Bingham* v. *City of Manhattan Beach*, 341 F.3d 939 (CA9 2003) (noting that "[i]n evaluating a custodial arrest conducted by state officials, federal courts must determine the reasonableness of the arrest in reference to state law governing the arrest" where an officer violated a California statute prohibiting police from arresting an adult for driving with an expired license) *Id.*, at 949-50 (quoting *Mota*, 982 F.2d, at 1388) (internal quotations omitted)).

penalty could be imposed. *Id.*, at 199. The D.C. Circuit found that the arrest for this misdemeanor was unlawful and that the contemporaneous search that produced narcotics violated the defendant's Fourth Amendment rights. *Id.* Therefore, the court concluded, the evidence must be suppressed. *Id.*

The effect of the rule articulated in each of these cases and is to allow state legislatures the power to change the contours of the Fourth Amendment. *But see Elkins*, 364 U.S., at 223-24 ("The test [for admissibility of evidence] is one of federal law, neither enlarged by what one [S]tate court may have countenanced, nor diminished by what another may have colorably suppressed."). This minority approach has been rejected by a broad spectrum of decisions in other state and circuit courts, creating an irreconcilable conflict between the two.

III. States Will Benefit From a Clear Determination of Their Powers and Responsibilities.

States often choose to create protections greater than those provided under the federal Constitution. But States need certainty as to the intersection of their power to regulate arrests and their ability to craft their own remedies for those violations. Requiring federal law probable cause and constitutionality to turn on state statutes not only injects a needless complexity into the law-enforcement process, *cf. Brinegar* v. *United States*, 338 U.S. 160, 176 (1949) ("The rule of probable cause is a practical, nontechnical conception . . . . Requiring more would unduly hamper law enforcement."), but also would destroy federal uniformity, as the disparate state laws would create disparate federal rights.

The wisdom of the majority position lies in its ability to separate state-created rights from federal constitutional rights. Indeed, this approach accords even greater respect to individual States' powers to provide rights beyond the Constitution by also giving each state the freedom to craft its own remedies for violations of those rights. The melding of state-law regulations into federal constitutional rights undermines the benefits of both: On the one hand, it mandates a uniform remedy for a broad spectrum of state statutory violations; on the other, it allows state laws to create variations in federal constitutional protections.

The majority rule rightly declines to predicate the Fourth Amendment on state-law statutory questions. Rather, it requires the States to assume the responsibility for enforcing their own laws. As such, the majority position maintains both the need for state sovereignty in enforcing state laws and the need for uniformity in the enforcement of federal rights. Both state and federal courts would benefit from the Court's guidance in determining the precise intersection between State and constitutional law in interpreting the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the Virginia Supreme Court.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

SUSANNA DOKUPIL
Assistant Solicitor General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR
AMICI CURIAE

March 2007

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No. 06-1082

Supreme Court, U.S.
FILED
NOV 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

JOINT APPENDIX

S. JANE CHITTOM
Appellate Defender
Counsel of Record

OFFICE OF THE APPELLATE DEFENDER
701 East Franklin Street, Suite 1001
Richmond, Virginia 23219
Telephone: (804) 225-3595
e-mail: JChittom@idc.virginia.gov

THOMAS C. GOLDSTEIN
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Counsel for David Lee Moore

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
e-mail: wthro@oag.state.va.us

Counsel for the Commonwealth of Virginia

Petition For Certiorari Filed March 7, 2007
Certiorari Granted September 25, 2007

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IN THE SUPREME COURT OF VIRGINIA

Case No. 052619

DAVID LEE MOORE,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
12/21/05	Petition for Appeal Received
01/17/06	Brief in Opposition Received
03/13/06	Record Received
05/31/06	Certificate of Appeal
05/31/06	Disposition ORDER granting Petition for Appeal
07/07/06	Opening Brief Received
07/07/06	Appendix Received
07/31/06	Appellee Brief Received
08/14/06	Reply Brief Received
11/03/06	Opinion issued REVERSING and entering final judgment

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IN THE COURT OF APPEALS OF VIRGINIA

Case No. 2648-03-1

DAVID LEE MOORE,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
10/14/03	Copy of Notice of Appeal
01/05/04	Record Received
03/04/04	Brief in Opposition Received
03/24/04	Petition for Appeal
04/14/04	ORDER GRANTING Appeal
05/14/04	Certificate of Appeal
05/27/04	Appellant's Designation
06/09/04	Appellee's Designation
06/22/04	Opening Brief Received
06/22/04	Appendix Received
07/19/04	Appellee Brief Received
08/02/04	Reply Brief Received

02/22/05	Disposition: REVERSED and FINAL JUDGMENT
03/08/05	Petition for Rehearing
03/22/05	Petition for Rehearing EN BANC – GRANTED
12/21/05	Notice of Appeal to the Supreme Court of Virginia

IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

Case No. 03-0611

COMMONWEALTH OF VIRGINIA,

V.

DAVID LEE MOORE,

DEFENDANT.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
03/26/03	Motion to Suppress
04/03/03	Grand Jury Indictment
07/23/03	Trial
07/25/03	FELONY ORDER – Motion to Strike is Overruled; defendant is found GUILTY and is referred for a pre-sentence investigation and report
10/10/03	SENTENCING ORDER
11/03/03	Transcript of July 23, 2003 filed

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA	:	INDICTMENT
v.	:	NO. 03-611
David Lee Moore,	:	
Defendant	:	

MOTION AND NOTICE
PURSUANT TO SECTION 19.2-266.2

COMES NOW the defendant, by counsel and filed this Motion and Notice, pursuant to Section 19.2-266.2 of the Code of Virginia, 1950, as amended, and affirmatively makes his motion to suppress all evidence seized as incident to or as basis for his arrest and/or seized as incident to a search warrant on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth, or Sixth Amendments to the Constitution of the United States, or Article I, Section 8, 10, or 11 of the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination, and further states that this Motion and Notice is filed not later than seven (7) days prior to trial.

David Lee Moore,

By /s/ Amy Chudzinski
Of Counsel

Amy Chudzinski
Assistant Public Defender
600 Dinwiddie Street
Portsmouth, Virginia 23704

CERTIFICATE

I certify that a true copy of the foregoing Motion and Notice was delivered this 26th day of March, 2003 to Ali Sprinkle, Assistant Commonwealth's Attorney, First Union Bank Building, 430 Crawford Street, 3rd Floor, Portsmouth, Virginia 23704.

/s/ Amy Chudzinski

COMMONWEALTH OF VIRGINIA

[SEAL]

Virginia:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Grand Jury Indictment

The Commonwealth of Virginia **Plaintiff** **v.** **DAVID L. MOORE** **Defendant**	**Manufacture, Sale, or Distribution of Cocaine, a Schedule II Controlled Substance, or Possession with Intent to Manufacture, Distribute or Sell Cocaine, a Schedule II Controlled Substance** **03-0611**

THE GRAND JURORS OF THE COMMONWEALTH OF VIRGINIA, in and for the body of the City of Portsmouth, and now attending the said Court, upon their oaths, present that, in the City of Portsmouth, the accused,

DAVID L. MOORE

1. **Manufacture, Sale, or Distribution of Cocaine, a Schedule II Controlled Substance, or Possession with Intent to Manufacture, Distribute or Sell Cocaine, a Schedule II Controlled Substance**

On or about Thursday, February 20, 2003, did manufacture, sell, give, distribute or possess with

intent to manufacture, sell, give or distribute Cocaine, a controlled substance listed in Schedule II of the Drug Control Act, in violation of §§18.2-248; 54.1-3446 through 54.1-3452; 18.2-10 of the Code of Virginia (1950) as amended.

G J
WITNESS: Sgt. Donald K. Butler **A TRUE BILL** ✓

CGJ: 03/13/2003 **NOT A TRUE BILL** _

GRAND JURY: 04/03/2003

/s/ Garland C. Butler
Foreman of the Grand Jury

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA	:	
	:	INDICTMENT
Vs.	:	NO. 03-0611
DAVID LEE MOORE	:	

TRANSCRIPT

Following is stenographic transcript of the proceedings in the above-entitled case, in said court, on the 23rd day of July, 2003, before the Honorable Mark S. Davis, Judge of the Circuit Court of the City of Portsmouth, Virginia.

APPEARANCES: ALI T. SPRINKLE,
Attorney for the Commonwealth.

AMY CHUDZINSKI,
Counsel for the Defendant.

(Court reporter sworn.)

FAYE B. CHAPMAN, COURT REPORTER

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[8] Detective Karpowski.

THE COURT: Do you want to give me any kind of opening on your motion to suppress at all?

All right, go –

MS. CHUDZINSKI: I guess I don't understand –

THE COURT: All right. Go ahead.

DETECTIVE B. J. KARPOWSKI, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CHUDZINSKI:

Q Detective, going back to February 20, you radioed to other detectives regarding David Moore, is that correct?

A Yes and no.

Q Okay. When you radioed to Detective Anthony, did you tell him to pull over somebody named Chubs?

A There was a discussion going on over the [9] radio about an individual that was driving a car and the nickname Chub was mentioned. I radioed back that I had checked Chub's driver's license status the week before and that he was, in fact, suspended.

The vehicle was stopped and Mr. Moore was the driver. However, when I passed by, he was not the Chub I was referring to. I was referring to Christopher Delbridge.

Q Okay. So did you see Christopher Delbridge driving or –

A The week prior, yes, ma'am, but not on this particular date. When they said the nickname Chub, I was thinking in my mind Christopher Delbridge and

I informed them that that Chub's license was suspended, and then when I rode past the traffic stop and I saw Mr. Moore in custody, that was not the Chub that I had checked his license the week before.

MS. CHUDZINSKI: Okay. I don't have any further questions of this witness.

THE COURT: Okay. Miss Sprinkle?

CROSS EXAMINATION

BY MS. SPRINKLE:

Q You got information from them that they saw Chubs, is that right?

A Yes, ma'am.

[10] Q Okay. So then you then told them that you knew that Chubs had a suspended license?

A Yes, ma'am.

Q And it wasn't until after they were stopped that you realized it was not the same person you had thought?

A That's correct.

MS. SPRINKLE: Nothing further, Judge.

THE COURT: Is Christopher Delbridge, he has a street name, a nickname of Chub?

THE WITNESS: Chubs, yes, sir. He had just gotten out of the federal penitentiary probably a

month before and I had seen him, had correspondence with him and I'd seen him driving the week prior; that's why I checked his driver's license status.

THE COURT: And so you got some kind of radio communication going back and Detective Anthony on the channel – Well, you heard someone mention that they had seen Chubs and you thought that it was Christopher Delbridge?

THE WITNESS: That's correct.

THE COURT: And you radioed back to them, "Stop him because I know that he's –"

THE WITNESS: That's correct.

THE COURT: " – got a suspended [11] license."

THE WITNESS: Yes, sir.

THE COURT: You later drove by the scene and realized that it was not Christopher Delbridge?

THE WITNESS: That's correct.

THE COURT: Did you know of anybody else who has a street name or nickname of Chubs?

THE WITNESS: No, sir.

THE COURT: At the time?

THE WITNESS: No, sir, I did not.

THE COURT: Okay. Thank you. Any other questions that I have raised for you all?

MS. SPRINKLE: No, sir, Judge.

MS. CHUDZINSKI: No, sir.

THE COURT: All right. Thank you, Detective.

(Witness excused.)

MS. CHUDZINSKI: I'm going to call Detective Anthony.

---

[12] *DETECTIVE MARK ANTHONY*, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CHUDZINSKI:

Q Detective Anthony, did you issue a traffic stop of Mr. David Lee Moore on February 20?

A Myself and Detective McAndrew issued a traffic stop.

Q Okay. And why did you stop Mr. Moore for a traffic stop?

A Based on information I received over the radio from Detective Karpowski that the person who

was driving the car who I knew as Chubs driver's license was suspended.

Q Okay. So you knew Mr. Moore as Chubs?

A Yes.

Q Okay. And when you pulled Mr. Moore over, you did determine that his license was suspended, is that correct?

A We ultimately determined that, that's correct.

Q Okay. Did you issue him a summons for a suspended license?

[13] A No, we effected an arrest.

Q Why did you choose to arrest him?

A Just our prerogative, we chose to effect an arrest. Additionally, subsequent to the traffic stop, narcotics were eventually recovered.

Q But why didn't you just issue him a summons?

A Well, we were still in the middle of the investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, we were also conducting a narcotics investigation.

Q Okay. When you pulled him over, were there any drugs in plain view?

A No.

MS. CHUDZINSKI: Okay. I don't have any further questions.

MS. SPRINKLE: I have a couple, Judge.

CROSS EXAMINATION

BY MS. SPRINKLE:

Q You never told Detective Karpowski that 'The Chubs I'm referring to is David Moore', you just said Chubs, is that correct?

A The conversation was strictly around the name Chubs.

Q And when you stopped Mr. Moore, he was the [14] only person in the car, is that right?

A He was the only human being in the car. There was an animal in the car as well.

MS. SPRINKLE: I don't have any further questions, Judge.

THE COURT: Were you and Detective McAndrew together in the same vehicle?

THE WITNESS: No, we were in two separate vehicles.

THE COURT: And this was during the regular course of your work day?

THE WITNESS: Yes.

THE COURT: And what was the animal that was in the car?

THE WITNESS: It was a dog. I'm not sure if it was a Pit Bull; I'm not real good with dogs. It was big enough and loud enough that I didn't want to get too close to it. We actually had Animal Control come out and respond to retrieve the animal from the vehicle.

THE COURT: Were you aware or did you know this other gentleman that Detective Karpowski mentioned, Christopher Delbridge?

THE WITNESS: I know of him.

THE COURT: At the time, did you [15] know of him?

THE WITNESS: I knew of him but I was not aware that he also had the nickname of Chubs. The only person I've been familiar with associated with the name is David Lee More [sic].

THE COURT: So you had prior involvement with Mr. Moore?

THE WITNESS: I think we've had contact. I've never arrested him but through a series of interviews with other people we've arrested, his name has frequently come up and he's been referred to as Chubs. That's how we knew his nickname.

THE COURT: Is the nickname in some kind of documentation that you all keep?

THE WITNESS: I don't know if it's in any that I have on file. I know I've both casually and formally talked to people and his name has come up. His name has also come up with ATF and specifically with Task Force Agent Darryl Logwood. I mean we've known Mr. Moore for many, many years, probably going back seven or eight years when him and people he's been associated with used to live in Cradock, so at least for seven years we've associated that [16] nickname with him.

THE COURT: What division of the police department, if you know, is Detective Karpowski connected with?

THE WITNESS: He's in the same unit I am which is the Special Investigations Unit which primarily deals with narcotics.

THE COURT: Okay. Counsel, have I raised anything for you?

MS. CHUDZINSKI: No, sir.

THE COURT: All right. Miss Sprinkle?

MS. SPRINKLE: Judge, you haven't raised any questions for me.

THE COURT: Okay. Detective Anthony, you can have a seat back.

(Witness excused.)

THE COURT: All right, Miss Chudzinski.

MS. CHUDZINSKI: Judge, based on the evidence, I would ask you to suppress the narcotics in this case which were gotten as a result of the arrest. I don't think that there has been sufficient evidence to show that an arrest was necessary in this case. This was a traffic stop. And I understand if Detective Anthony was acting [17] on information that he thought it was proper to stop this vehicle, I understand that, but once he determined that –

THE COURT: It was a good faith exception in that situation; you would agree to that?

MS. CHUDZINSKI: Yes, I would agree to that. He was acting in good faith; he thought that he was pulling over the proper person. I don't question that. However, once he determined that this person's license was suspended, Detective Karpowski said he radioed that was not the person he was referring to. However, I understand this is a proper traffic stop, this person's license is suspended, but I think that in this case a summons should have been issued and he should have been released.

I don't think there's been evidence to show that it was proper for him to arrest Mr. Moore so, because the arrest was not proper, I would ask you to suppress any evidence obtained therefrom.

THE COURT: Okay. Is there any particular case that you wish to call my attention to?

MS. CHUDZINSKI: No, sir. I just think [18] that in this situation I don't think any

circumstances, any unusual circumstances were cited, other than a barking dog, that would indicate that Mr. Moore would need to be placed under arrest for a suspended license.

THE COURT: Okay. Miss Sprinkle?

MS. SPRINKLE: Judge, I think it's appropriate that they arrest him for the suspended license. It's a Class One misdemeanor. They've stated that he was the only person in the car, driving the car. Therefore, there's nobody else that could have driven the car or anything like that so he, then, therefore, would have had to have driven the car away, and a reason to arrest them is if you don't think they're going to discontinue the activity for which you're placing them under arrest. I think it's proper that they made the arrest for the suspended license. I ask you deny the motion.

THE COURT: All right. It appears that Virginia follows the rule that warrantless misdemeanor arrests are invalid unless the misdemeanor was committed in the arresting officer's presence.

In this case, the testimony was that he [19] was pulled and he was driving on a suspended license.

An offense is committed in the arresting officer's presence, according to the Supreme Court of Virginia, when he has direct personal knowledge through his sight, hearing and other senses that it is then and

there being committed. That's Galliher versus Commonwealth, 161 VA 1014, a 1933 case.

Furthermore, the Virginia or – excuse me – the United States Supreme Court held last year – excuse me – 2001, in the case of Atwater versus City of Lago Vista, 532 U.S. 318, that, "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the defendant." So I'm going to deny the motion to suppress.

Okay. Thank you, Miss Chudzinski.

MS. SPRINKLE: Thank you, judge.

THE COURT: All right. I'll be happy to hear from you all, hear your evidence.

MS. CHUDZINSKI: I guess at this point I have a motion to separate witnesses.

[20] THE COURT: All right. Anyone who's going to testify, please step into the hallway or into the witness room.

MS. CHUDZINSKI: Judge, I won't need to call Detective Karpowski any further. I don't know if –

MS. SPRINKLE: I don't believe I need to, Judge.

THE COURT: All right, We have an understanding that the testimony that was presented will be incorporated into the trial?

MS. CHUDZINSKI: Yes, sir.

THE COURT: Thank you, Detective. Please don't discuss your testimony.

MS. SPRINKLE: Call Detective McAndrew.

(Whereupon, the witness was sworn.)

DETECTIVE T. McANDREW, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SPRINKLE:

[21] Q Good morning. Can you please state your name and occupation for the Court?

A Detective T. McAndrew, Portsmouth Police, Special Investigations Unit.

Q Sir, were you so employed in that capacity February 20 of this year?

A Yes, ma'am.

Q On that date did you come in contact with a David L. Moore?

A Yes, ma'am, the gentleman in the green jail outfit next to defense counsel.

MS. SPRINKLE: Thank you. Judge, can the record reflect he's identified the defendant, please?

THE COURT: It will reflect.

MS. SPRINKLE: Thank you.

BY MS. SPRINKLE:

Q Detective McAndrew, where did you come in contact with the defendant?

A It was in the 2000 block of Airline Boulevard in the City of Portsmouth. I was assisting Detective Anthony on a traffic stop where Mr. Moore was driving the vehicle.

Q And did you all pull over that vehicle?

[22] A Yes, we did.

Q And why was that?

A Due to the fact that Mr. Moore had a suspended license.

Q And what happened when you pulled the vehicle over?

A Stopped the vehicle, Detective Anthony had contact with Mr. Moore and based on his contact with him, their conversation, Mr. Moore was taken to the City of Chesapeake to a hotel room there.

Q Did you ever check to see if Mr. Moore's license was suspended?

A Personally, I did not. Detective Anthony ran his license that day.

Q Was Mr. Moore placed under arrest?

A Yes.

Q Okay. At some point, was Mr. Moore searched after the arrest?

A Yes. I searched him at the Econo-Lodge in the City of Chesapeake. He was wearing a tan jacket, was like a leather-type jacket, and inside the right front pocket I recovered one clear plastic baggie containing approximately sixteen grams of suspected crack cocaine. I do have that item.

MS. SPRINKLE: Judge, may I approach?

[23] THE COURT: You may.

BY MS. SPRINKLE:

Q Showing you this item, is this the item that you referred to?

A Yes, that is the suspected crack cocaine that I recovered out of his right front pocket of the tan jacket he was wearing.

Q What did you do with it after you recovered it?

A I kept it in my sole care and custody. I transported it to headquarters where I packaged it and placed it in the red mailbox in Property and Evidence.

Q Was that in proper working order on that day?

A Yes, it was.

Q Does this appear to be in the same condition as it was when you packaged it, besides the yellow tape?

A Yes.

Q Does it have your initials on it?

A Yes, at the top.

(Whereupon, Ms. Sprinkle displayed item to the defense.)

MS. SPRINKLE: Judge, I move to introduce this just for identification purposes [24] as Commonwealth's 1.

THE COURT: All right. It will be marked Commonwealth's Number 1.

BY MS. SPRINKLE:

Q Sir, did you recover anything else from the defendant on that day?

A I also recovered five hundred and sixteen dollars U. S. currency from Mr. Moore's right front

pocket of the blue jeans he was wearing at the time he was taken into custody.

Q Showing you this item, do you recognize this?

A Yes, that's the U. S. currency, five hundred and sixteen dollars, that I recovered from Mr. Moore's right front pocket of the blue jeans he was wearing.

Q What did you do with the currency once you recovered it?

A I kept it in my sole care and custody. I transported it to headquarters, packaged it and placed it in the red mailbox in Property and Evidence.

(Whereupon, Ms. Sprinkle displayed item to the defense.)

BY MS. SPRINKLE:

Q Sir, does that appear to be in the same [25] condition as when you placed it in the mailbox?

A Yes.

Q What is this item?

A I did not put that on there. I believe Property and Evidence, Swan, may have put that on there.

Q Are these your initials?

A Yes.

MS. SPRINKLE: Judge, we move to introduce as Commonwealth's 2.

THE COURT: Any objection?

MS. CHUDZINSKI: Well, if I may ask him a couple of questions?

THE COURT: Yes, you may.

CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q Was I correct when you said that these items you recovered when you were in Chesapeake?

A Yes.

Q Did you search Mr. Moore prior to taking him to Chesapeake?

A He was placed in my unmarked police vehicle by Detective Anthony and there was a miscommunication between myself and Detective Anthony. I was under the impression that he had already searched him prior to placing [26] him in my police vehicle.

MS. CHUDZINSKI: Okay. May I approach the witness?

THE COURT: You may.

BY MS. CHUDZINSKI:

Q On both of these items that you just described, where does it say location of recovery?

A Where? It says Airline Boulevard and Winchester Street, but that was where the initial traffic stop was done. I put that there to show that he was stopped at that intersection initially.

Q So these were not recovered there?

A But it also says, if you look, where it was recovered on his person, recovered out of suspect's right front pocket of the tan jacket, and the other one says recovered out of suspect's right front pocket of the blue jeans that he was wearing.

Q Okay. Well, if there was miscommunication about whether he was searched or not, how many – How many detectives or police officers were involved in this arrest and search?

A It was myself, Anthony, Detective Karpowski, I want to say Detective Lewis responded to the scene.

Q Anyone else?

[27] A Not that I recall.

Q How many people actually had contact with Mr. Moore? Was it all four or –

A Initially, Detective Anthony came in contact with him on the driver's side of the vehicle, and I believe he had a Pit Bull inside the vehicle that we had to call for Animal Control to get out of the vehicle prior to taking him out of the vehicle because the dog was very upset with us being there, and Detective Anthony spoke to him the whole time we were on scene.

THE COURT: Spoke to the dog or to Mr. Moore?

THE WITNESS: Mr. Moore; I'm sorry.

BY MS. CHUDZINSKI:

Q Were there periods of time when Mr. Moore wasn't in anyone's custody?

A What do you mean? I don't understand.

Q Well, you said at one point he was –

A He was never left alone.

Q Okay. So he was never searched prior to you going to Chesapeake?

A Like I said, there was a miscommunication between myself and Detective Anthony. I was under the impression that he searched him prior to placing him in my [28] police vehicle. When we were in Chesapeake, prior to me putting him back in my vehicle, I searched him and that's when I discovered them items.

Q And where, exactly, were these items?

A The suspected crack cocaine was located in the right front pocket of the tan jacket that Mr. Moore was wearing, and the five hundred and sixteen dollars in U. S. Currency was recovered in Mr. Moore's right front pocket of the blue jeans that he was wearing at the time he was taken into custody.

Q Was he wearing the jacket the entire time from when you stopped him until you searched him?

A Yes.

Q Did he tell you where the money came from?

A I didn't interview him at all. I was the evidence person. Basically, I took custody of all the evidence from him as well as at the hotel room.

Q So he made no statement to you at all?

A Not to me.

MS. CHUDZINSKI: No further questions.

THE COURT: Okay. We still have the five hundred sixteen dollars moved into evidence, Miss Sprinkle, and I think you were – You objected –

MS. CHUDZINSKI: Well, I –

[29] THE COURT: – said you wanted to ask some questions.

MS. CHUDZINSKI: Well, actually, I don't think she moved either one in; I think it was just for identification purposes.

THE COURT: She said she was moving the second for admission. Maybe I misread her. I will allow Miss Sprinkle to speak for herself.

MS. SPRINKLE: Judge, I was going to introduce the money.

THE COURT: Okay. You have moved to introduce the money. Is there any objection to the money coming into evidence?

MS. CHUDZINSKI: No, sir.

THE COURT: All right. It will be marked and admitted as Commonwealth's Number 2.

MS. SPRINKLE: Thank you, Judge.

THE COURT: Number 1 has just been marked for identification purposes.

MS. SPRINKLE: That's correct, Judge. Judge, I still had some questions –

THE COURT: All right. Go ahead, Miss Sprinkle.

DIRECT EXAMINATION (Cont'd)

[30] BY MS. SPRINKLE:

Q Detective, you said that he was never left alone once he was arrested, is that correct?

A That's correct.

Q Were you – Could you see him the whole time you were there?

A Anthony had him in the right front passenger seat of my vehicle, was talking to him, and when we left the scene, I drove my vehicle and he was in the right front passenger seat.

Q Did you ever see him change the clothes that he had on from the time you arrested him?

A No, ma'am.

Q Did you ever see anybody place anything into his clothes?

A No, ma'am.

Q And he was wearing the items of clothing in Portsmouth when you stopped him?

A Yes, ma'am.

Q And after you all were finished in Chesapeake, is that the only contact you had with David Moore after that?

A He was brought to our office and was interviewed by Detective Anthony, and I believe Detective Logwood from the ATF came there.

Q And all the events you testified to occurred [31] in the City of Portsmouth with the exception of when you went to Chesapeake?

A Yes, ma'am.

MS. SPRINKLE: Please answer any questions of Miss Chudzinski.

MS. CHUDZINSKI: I don't have any further questions.

THE COURT: Detective McAndrew, so when he was arrested, he was placed in the right front passenger seat of your vehicle?

THE WITNESS: Yes, sir.

THE COURT: And Detective Anthony then questioned him while he was sitting there?

THE WITNESS: Yes, sir.

THE COURT: Then you entered the vehicle. The defendant remained in the right front passenger seat when you got into the vehicle?

THE WITNESS: Yes, sir.

THE COURT: And then you drove him to Chesapeake?

THE WITNESS: Yes, sir.

THE COURT: And then you searched him at that point?

THE WITNESS: At the hotel room, yes, sir.

[32] THE COURT: So you walk around to the passenger door, unlock it, he gets out and you all walk into the hotel?

THE WITNESS: He took us to a hotel room. I believe it was the Econo-Lodge on Military Highway by Frank's Truck Stop, and he was with us the whole time; he was never left alone.

THE COURT: At what point did you realize he had not been searched?

THE WITNESS: It was –

THE COURT: Before you got to the hotel?

THE WITNESS: No, sir, it was while we were at the hotel I searched him.

THE COURT: Had he been patted down before he got into your car?

THE WITNESS: That I don't know. Like I said, Anthony had contact with him on the driver's side, actually had him get out of the vehicle. As far as searching him, I don't know what he did, to be honest with you.

THE COURT: All right. And upon entering the hotel room, at what point did you search him?

THE WITNESS: While we were in the [33] room.

THE COURT: Was it the first thing you did, second thing you did?

THE WITNESS: I did – We did a protective sweep of the hotel room to make sure nobody else was in there hiding in the bathroom or anything. Then I searched him after that and when I was finished searching him and recovering those items, we searched the hotel room.

THE COURT: So nobody was there when you arrived?

THE WITNESS: No, sir.

THE COURT: Did he represent to you this was his hotel room?

THE WITNESS: He was talking to Anthony the whole time. Like I said, he brought us to that hotel room.

THE COURT: Okay. Did I raise any questions for you all, Counsel?

MS. SPRINKLE: Judge, just briefly – You were – He was in your sight the entire time at the hotel?

THE WITNESS: Yes, ma'am.

MS. SPRINKLE: Was he in handcuffs at that time?

[34] THE WITNESS: Yes.

MS. SPRINKLE: And you or Detective Anthony never placed anything on his person?

THE WITNESS: No.

MS. SPRINKLE: Nothing further, Judge.

CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q So as far as you know, you were the only person that searched him?

A I searched him, yes.

Q Did anybody else assist you in searching him?

A No

MS. CHUDZINSKI: No further questions.

THE COURT: Okay. Thank you, Detective McAndrew. May he go or do you want him to remain?

MS. SPRINKLE: I think I need to hold him, Judge.

THE COURT: All right. Thank you.

(Witness excused.)

MS. SPRINKLE: Detective Anthony.

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[35] *DETECTIVE MARK ANTHONY*, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SPRINKLE:

Q Good morning. Can you please state your name and occupation for the Court?

A Detective Mark Anthony, Portsmouth Police.

Q Sir, were you so employed in that capacity on February 20 of this year?

A Yes.

Q On that date, did you come in contact with a David L. Moore?

A Yes, I did, the individual in the green jumpsuit next to defense counsel.

MS. SPRINKLE: Judge, if the record can reflect he's identified the defendant.

THE COURT: It will reflect.

MS. SPRINKLE: Thank you, Judge.

BY MS. SPRINKLE:

Q Sir, where did you come in contact with him on that day?

A It was approximately the 2000 block of [36] Airline Boulevard was the initial sighting of him and we eventually stopped him approximately the 1700 block of Airline Boulevard in the City of Portsmouth.

Q And why did you stop him?

A Based on information that I received from Detective Karpowski that Mr. Moore's, who I know as Chubs, license was suspended.

Q And when you stopped him, were you able to verify whether or not his license was, indeed, suspended?

A Yes, I was, and yes, it was.

Q What did you do once you found out that his license was suspended?

A Well, we effected an arrest and pursuant to that conducted a narcotics investigation.

Q What happened after you placed him under arrest?

A Well, I talked to him briefly – I advised him of his Miranda rights. I did that approximately fifteen minutes after we had him stopped, approximately three fifteen. I asked him if he understood his rights; he acknowledged that he did. We talked to him about whether or not he was in possession of narcotics. We asked him where he was staying. He stated he was staying in a hotel in Chesapeake.

THE COURT: Is there an objection?

[37] MS. CHUDZINSKI: Judge, may I briefly ask him a couple of questions about the Miranda?

MS. SPRINKLE: That's fine.

THE COURT: Okay.

CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q Detective, can you describe – What Miranda rights did you read to him?

A Well, I'll verbally state to you what I verbally stated to him as I do all the time. I don't use a card. I stated this: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, the Court will consider appointing an attorney for you. Do you understand your rights?" And he replied, "Yes."

Q And that was his only reply, then, that he understood them?

A In terms of acknowledgment, yes.

Q Okay. Then you proceeded to question him?

A Yes.

Q Did you ask him if he waived his Miranda rights?

A No.

[38] Q And he made a statement to you?

A Well, just in response to questions.

MS. CHUDZINSKI: Judge, I would ask you not to consider any of the statement based on the fact that we don't have a waiver of Miranda.

MS. SPRINKLE: Judge, I have had this come up before and they don't have to ask that last question, "Do you waive these rights?" They've been told, "Anything you say can and will be used against you, You have the right to remain silent." They continue to question him, he continues to talk. I don't think you have to have that last question of, "Do you waive your rights?"

You have to consider whether or not it was voluntary. There's no evidence there was any force or intimidation, coercion, anything of that nature.

THE COURT: All right. Let's see what Professor Bacigal has to say about this.

"In the absence – " He says, "In the absence of an explicit waiver, a waiver can in some cases or circumstances be inferred from the actions and words of the person interrogated." He cites the U. S. Supreme Court case of North [39] Carolina versus Butler, 441 U.S. 369, a 1979 opinion. "In North Carolina versus Butler, the defendant refused to sign a waiver form but did agree to talk. Examining particular facts and circumstances, the Supreme Court found that a valid waiver had occurred."

In the case of Smith versus Commonwealth, Virginia Court of Appeals case, 7 Va. App. 310, 1988, the defendant was asked whether he wished to make

a statement. He responded, "No, sir." The police officer then asked, "Do you want to tell me what happened this evening prior to the time I placed you under arrest?" In view of the defendant's prior admissions, the police officer's question was deemed to be one of clarification and defendant's subsequent statement was voluntary and made pursuant to a valid waiver of his privilege against self-incrimination.

So in this case the testimony is that the rights were given, there was no question 'Do you waive' or 'You don't waive', they proceeded to question him after giving the rights.

Why is that different, Miss Chudzinski, from the North Carolina Butler situation where the defendant refuses to sign a waiver but then agrees [40] to talk? And I know you haven't read the case. I'm not trying to be difficult with you. I'm just asking you if you wish to comment on that, why, if you have any response.

MS. CHUDZINSKI: Well, what I think is different is that in that situation he was actually asked, you know. He didn't want to sign the waiver but he did agree to talk, and I don't think we have any evidence of that. All we have is he indicated 'Yes, I understand', but he wasn't asked, "Do you want to make a statement? Do you want to talk to me? Do you want to answer my questions?" There wasn't anything like that. They just started questioning him,

and I don't think there was an effective waiver or that there's evidence of that.

And I guess just further, there was no form. We don't have any evidence that he was given a form like sometimes we'll see where there's a form with Miranda rights written and sometimes they'll initial that they understood each right. No notes were taken, nothing was written, nothing was presented to him like that.

THE COURT: Okay.

MS. SPRINKLE: Judge, just to that point, there's nothing requiring them to give a [41] form, for them to sign a form. We have Detective Anthony's testimony that he read him his Miranda rights, he's told you what rights he said and he also indicated that he said did he understand them and he said he understood them. There's nothing requiring them to have him sign something saying he acknowledges his rights.

THE COURT: I think this is similar to the Supreme Court situation in North Carolina versus Butler. The fact that you're presented with a form and then you refuse to sign it but then you talk, I don't find that to be significantly different from the situation where you're read your rights, you're told you have the right to remain silent and then a question is asked and you respond. I think that's an implicit waiver.

Now, the situation is obviously different where someone says 'I'm not going to talk; I don't want to say anything', and then you continue to question him. There is no testimony here that anything like that happened, so I'm going to allow the testimony.

MS. SPRINKLE: Thank you, Judge.

DIRECT EXAMINATION (Cont'd)

[42] BY MS. SPRINKLE:

Q Detective Anthony, you talked to him about where he was staying; at some point you all then went to Chesapeake, is that correct?

A Yes, we went to, I think it's the Econo-Lodge in Chesapeake off of Military Highway.

Q Did you search the defendant prior to going there?

A No.

Q Now, while you all were at the traffic stop, did you stay in contact with the defendant the whole time you all were there?

A I had visual on him. Initially, I removed Mr. Moore from the vehicle and I think it was me who actually placed handcuffs on him and I initially engaged him in conversation, and at some point prior to going over to Chesapeake, though, he was walked over to Detective McAndrew's vehicle and it was there at Detective McAndrew's vehicle that he signed

a waiver of consent allowing us to go to his hotel room and McAndrew drove him to the Econo-Lodge with me behind him, basically.

Q While you all were at the location of the traffic stop, did you ever see anyone else have any contact with the defendant?

A No. There was no one else present. No one [43] else got close.

Q Was – From the time you stopped him in Portsmouth until the time he was searched in Chesapeake, was he wearing the same clothing?

A Yes.

Q Were you present when the defendant was searched?

A Yes.

Q And where did that occur?

A Inside the hotel room in Chesapeake.

Q Were you there – Did you see whether or not anything was recovered?

A I observed Detective McAndrew recover some crack cocaine from I think his coat pocket, but I don't remember which pocket it was.

Q And did you have any contact with those items?

A I don't think I did. I think he recovered that and continued to collect evidence in Chesapeake.

Q At some point was the defendant brought here, back to Portsmouth?

A Yes.

Q At the time that he was back here in Portsmouth, did he make any statements about the crack cocaine that was recovered?

A Yes.

[44] Q And what did you hear him state regarding the crack cocaine?

A The conversation took place while Darryl Logwood who, again, is the Portsmouth task force agent assigned to ATF, was conducting an interview with Mr. Moore with regard to some activities that he's associated with, and during the question and answer session, Mr. Moore admitted that the crack cocaine in his pocket was, in fact, his.

Q You were present during this interview?

A Yes.

Q You could hear these statements. And other than admitting that it was his, did he say anything else regarding the cocaine?

A Yes, he did. Mr. Moore talked about a gentleman that he has been, to use the street term, re-upping from which means getting his supply of

crack cocaine for distribution, and he said, if I can refer to my notes, approximately two to three times per week he purchased amounts from an eighth of an ounce to a quarter of an ounce from a man named Cedric Williams who lives over in Norport Apartments or Byrd Lane, that area over there, and the amount he purchased from Mr. Williams was intended for distribution and that Mr. Moore most of the time would simply drive around in his vehicle with these quantities [45] and, as people would call him on the phone, he would drive to locations and make deliveries.

Q Was that the end of your contact with him for that time?

A Mr. Moore was in the office quite a bit of time while we were conducting paperwork. There was other conversations ongoing but nothing substantive that I can recall.

Q Sir, when you were able to verify that he had a suspended license, do you have the DMV abstract with you?

A Yes.

MS. SPRINKLE: Your Honor, may I approach?

THE COURT: You may.

BY MS. SPRINKLE:

Q Did he ever make any statement about the license?

A He may have but I don't recollect what he may have said.

(Whereupon, Ms. Sprinkle displayed item to the defense.)

MS. SPRINKLE: Judge, move the abstract [46] as Commonwealth's Number 3.

THE COURT: Any objection?

MS. CHUDZINSKI: No, sir.

THE COURT: The DMV abstract will be marked – You're offering it for admission?

MS. SPRINKLE: That's correct.

THE COURT: – for admission as Commonwealth's Number 3.

BY MS. SPRINKLE:

Q Sir, did you also get all his pedigree information from him?

A One of us did; I don't remember who it was but – I don't remember. We did but I don't recall who did it.

Q Okay. Did all the events you testified to occur in the City of Portsmouth?

A Some of them did and some occurred in Chesapeake.

Q Besides what we've already talked about in Chesapeake?

A Yes.

MS. SPRINKLE: Please answer any questions Miss Chudzinski has.

[47] CROSS EXAMINATION

BY MS. CHUDZINSKI:

Q When he gave his statements at headquarters, did anybody record them?

A Well, first of all, it wasn't at headquarters, it was at our office at 601 Effingham Street.

Q I'm sorry. Did you record his statement?

A No.

Q You didn't have him write anything?

A I wasn't interviewing him in the office, Darryl Logwood was. I was participating in the interview, basically monitoring it, and I was coming in and out of the room.

Q So there were parts of the statement that you didn't even hear?

A That would be correct.

Q Who else was in the room besides Detective Logwood?

A There were a number of other police officers present. I couldn't tell you who else went into the room.

Q Because you were in and out, back and forth?

A Yes.

Q Okay. Going back earlier, going back to the traffic stop, you said that you did not search him prior to Detective McAndrew's searching him?

[48] A That's correct.

Q How many different people had Mr. Moore in custody?

A I think just me and McAndrew.

Q Did anybody else have access to him?

A I believe someone was riding with McAndrew but I don't recall who.

Q Okay. How many detectives were out there that day, or police officers?

A Well, there was certainly myself, McAndrew, Karpowski was in the area but I don't think he participated in the traffic stop; I think he drove by later, I understood. And there was somebody else with McAndrew, I believe, but I don't remember who that was.

Q Do you know if anybody else searched him besides Detective McAndrew?

A Not in my presence.

Q Do you know if anybody removed a watch from Mr. Moore at any point?

A I don't know.

Q Did Mr. Moore tell you where he was going that day?

A He may have but I don't remember. It was nothing that rung a bell or nothing that I took down.

MS. CHUDZINSKI: Okay. No further [49] questions.

MS. SPRINKLE: I just have one brief one, Judge.

REDIRECT EXAMINATION

BY MS. SPRINKLE:

Q When he was at the traffic stop in Portsmouth, you said he was in your vision the time you were there?

A In my custody, yes. I was the one who pulled him out of the vehicle and I believe I handcuffed him and stood with him on the side of the road while the other officers tended to the vehicle and, ultimately, the animal.

Q So you never saw anybody place anything in his pockets or anything of that nature?

A No.

Q And you did not do that?

A That's correct, I did not do that.

MS. SPRINKLE: Nothing further, Judge.

THE COURT: Detective, you removed him from his vehicle?

THE WITNESS: Yes, sir.

THE COURT: Questioned him for fifteen minutes –

THE WITNESS: Well, we were there fifteen minutes and during the course some [50] questions came out.

THE COURT: And you said fifteen minutes after the stop you Mirandized him?

THE WITNESS: Approximately.

THE COURT: Then you stood with him on the side of the road?

THE WITNESS: Yes. We were there for quite a period because we had to wait for Animal Control to get there and recover the dog. I'm guesstimating forty-five minutes to an hour from the time we initiated the stop until we left to go to Chesapeake.

THE COURT: And what did you do with the defendant during this forty-five minutes?

THE WITNESS: Mr. Moore was in handcuffs the entire time.

THE COURT: Was he handcuffed behind his back?

THE WITNESS: Yes, he was.

THE COURT: And did there come a time when you put him in a vehicle?

THE WITNESS: Ultimately, he was placed in Detective McAndrew's vehicle.

THE COURT: And who placed him there?

THE WITNESS: I think we kind of all [51] walked over that way. I got involved in conversation with someone else there and we walked over that way and at some point Mr. Moore then signed a consent form, and I recall using McAndrew's vehicle as a surface to write on, so I think we had to un-handcuff him briefly at some point so he could sign the form. He was placed back in handcuffs and we went to Chesapeake.

THE COURT: He had already been Mirandized at the time he signed the form?

THE WITNESS: Yes.

THE COURT: And then he was placed in McAndrew's vehicle?

THE WITNESS: Yes. I don't know who made the decision but that's the vehicle he went in.

THE COURT: Where was he placed, in the front or the back of the vehicle?

THE WITNESS: I don't recall, Judge, but normally it would be the front seat of the car. If there

was someone else with McAndrew – Unfortunately, I can't remember, but what we usually do is have him sit in the front seat of the car so the person behind can watch him.

THE COURT: So if there is a third [52] person, normally he's seated in the front seat. If there is no third person, would you normally seat him in the back seat?

THE WITNESS: Probably the only time – Our vehicles which are called soft cars or funny cars – It's not a regular patrol vehicle, obviously. In this case it was a Chevrolet Blazer. Probably the only time he would be seated in the back seat is if there was three other police officers, including the driver. In most other circumstances, whether it be just the police officer who's driving the vehicle and one or two other police officers, he's going to be sitting in the seat up front because that's the point we can have the most visual contact with him, make sure he's not doing anything he's not supposed to be doing.

THE COURT: So there's no barrier between the front seat and back seat the way there is in a marked police car?

THE WITNESS: Correct.

THE COURT: Then did you follow Detective McAndrew and the defendant in his vehicle to the Chesapeake hotel, motel?

THE WITNESS: I believe the defendant's [53] vehicle did not go with us –

THE COURT: No, I mean the defendant himself was in McAndrew's vehicle –

THE WITNESS: Yes.

THE COURT: Did you follow them?

THE WITNESS: Correct.

THE COURT: And then when you went into the Econo-Travel or Lodge in Chesapeake, did you all at some point realize that there had been no search?

THE WITNESS: Yeah, we had a mis-commnication. It probably stemmed from when I removed Mr. Moore from the vehicle, I didn't pat him down because during the course of the stop Mr. Moore was making a motion with his hands toward the floor, floorboard of the car, and based on my training and experience, a lot of people who are involved in criminal enterprises keep weapons there, so I removed him out of the vehicle, placed him in handcuffs and proceeded to do other things and I guess during the course of that time, because we waited so long, I think we both assumed that each other had searched him when, in fact, neither one of us had.

THE COURT: Neither one of you [54] patted him down?

THE WITNESS: I patted him down at the initial stop but that was just exterior clothing. I didn't feel anything I was concerned about immediately

then so I didn't proceed further with it. I was just searching for weapons. When I say searching, patting him down. I didn't go in his pockets or anything like that.

THE COURT: All right. Counsel, have I raised any questions for you all?

MS. SPRINKLE: No, sir, Judge.

MS. CHUDZINSKI: No, sir.

THE COURT: Thank you, Detective. Do you want him to stay?

MS. SPRINKLE: Yes, Judge, please.

THE COURT: All right.

(Witness excused.)

MS. SPRINKLE: Call Officer Swan.

(Whereupon, the witness was sworn.)

OFFICER J. R. SWAN, called as a witness on behalf of the Commonwealth, having been first duly

* * *

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No. 06-1082

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In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF THE PETITIONER

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record
wthro@oag.state.va.us

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General
smccullough@oag.state.va.us

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

November 5, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

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INTRODUCTION

From the ratification of our Constitution until the present time, States have borne the primary responsibility for enforcing criminal law. In so doing, the States, in an exercise of their sovereignty, have placed a wide variety of limitations on their officers' authority to arrest. However, these strictures are creatures of state law. A violation of these state laws does not transform a state law violation into a violation of the United States Constitution. The existence of probable cause to arrest has determined, and should continue to determine, the constitutional validity of an arrest. If the arrest is valid as a matter of national constitutional law, then any violation of state law is constitutionally irrelevant. The Constitution does not require suppression except where the Constitution itself is violated.

In the case at bar, it is undisputed that the arresting officers had probable cause to arrest, but that the arrest violated a state statute.[1] Because the arrest was founded on probable cause, the arrest was *constitutionally* proper. With a proper arrest from a constitutional standpoint, police could search incident to that arrest. Moore's Fourth Amendment rights were not violated, even if a state law was violated.

---

[1] *Virginia Code* § 19.2-74, required the officers to issue a summons and release Moore.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006) and is reprinted in the Appendix to the Petition at 1. The *en banc* decision of the Court of Appeals of Virginia is published as *Moore v. Commonwealth,* 622 S.E.2d 253 (Va. Ct. App. 2006) (*en banc*) and is reprinted in the Appendix to the Petition at 12. Finally, the panel decision of the Court of Appeals of Virginia is published as *Moore v. Commonwealth*, 609 S.E.2d 74 (Va. Ct. App. 2005) and can be found in the Appendix to the Petition at 35.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a), which allows this Court to review the federal law judgments of state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The Fourth Amendment of the Constitution of the United States, U.S. CONST. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *Virginia Code* § 19.2-74 provides, in pertinent part:

> A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such

person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT OF THE CASE

1. Two police detectives stopped David Lee Moore after they observed him driving on a suspended license in Portsmouth, Virginia.[2] J.A. at 11-13,

[2] The officers were engaged in a radio discussion with other officers concerning the fact that a man with the nickname "Chub" or "Chubs" was driving around the City of Portsmouth. J.A. at 11, 16. Detective Mark Anthony knew Moore as "Chub." J.A. at 14-15. Detective B.J. Karpowski knew another man with such a nickname, Christopher Delbridge, and he also knew that

(Continued on following page)

15.[3] Under state law, driving on a suspended license is a Class 1 misdemeanor, which carries a maximum punishment of one year in jail and a $2,500 fine. *Virginia Code* §§ 18.2-11, 18.2-272. Moore was arrested and, eventually, he was searched incident to the arrest. J.A. at 24. In the pocket of Moore's jacket, the police recovered 16 grams of crack cocaine and from his pants pocket $516 in cash. J.A. at 24-26. Moore was charged with possession of cocaine with the intent to distribute. J.A. at 7. Prior to his trial, his attorney filed a motion to suppress, alleging, among other things, that the arrest violated the Fourth Amendment of the United States Constitution. J.A. at 5.

2. At the suppression hearing, Moore conceded that the stop was proper and that officers had probable cause to believe that Moore's license was suspended. J.A. at 19. However, he contended that he should have been released with a summons rather than arrested, as provided by Virginia law. Since he was not released on a summons, Moore argued that the

---

the driver's license for Mr. Delbridge, a/k/a "Chub" was suspended. J.A. at 11. Detective Karpowski radioed to the other officers that they should stop Chub's vehicle for driving on a suspended license and they did so. J.A. at 13-15. Moore conceded at trial that the stop was proper based on the information available to the officers at the time of the stop, and he never raised any issue in connection with the stop in his appeal. J.A. at 19.

[3] J.A. refers to the joint appendix. Pet. App. refers to the documents attached to the petition for a writ of certiorari.

Constitution required that any evidence derived from the search incident to arrest should have been suppressed. J.A. at 19. The trial court, specifically relying on *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), concluded that because the officer had probable cause to arrest, the arrest was constitutionally proper. J.A. at 21. Therefore, the trial court denied the motion to suppress. J.A. at 21. Moore was convicted and sentenced to serve five years in prison, with one year and six months of that sentence suspended. Pet. App. at 2.

3. Moore appealed to Virginia's intermediate appellate court. A divided three-judge panel reversed. The panel majority observed that under *Virginia Code* § 19.2-74, the officers should have issued a summons for the misdemeanor offense instead of effecting a full custodial arrest. Since state law precluded a custodial arrest and required the issuance of a summons, the search incident to the arrest was unconstitutional. Pet. App. at 38-39. Although the panel majority acknowledged that *Atwater*, 532 U.S. at 354 and *Knowles v. Iowa*, 525 U.S. 113 (1998) did not compel this outcome, it nevertheless reasoned that suppression was "a logical and necessary extension of the decision in *Knowles*." Pet. App. at 44. A dissenting judge, however, reasoned that "[b]ecause Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution." Pet. App. at 49. The dissent further concluded that "it is clear that the Fourth

Amendment to the United States Constitution is not violated as a result of a state law violation." Pet. App. at 49.

Virginia obtained a rehearing *en banc* by the intermediate appellate court. By a vote of 7-4, the *en banc* court affirmed the conviction. It concluded that the constitutional legitimacy of an arrest under the National Constitution hinged on whether the officers had probable cause. Pet. App. at 20. Moore's arrest was unquestionably based on probable cause. Pet. App. at 20-21. The court reasoned that the presence of probable cause is an issue that must be "determined separate and apart from whether an arrest violates a state statute." Pet. App. at 22. Finally, since the Fourth Amendment did not compel suppression for the mere violation of a state statute, the *en banc* court held that the suppression of the evidence was unwarranted. Pet. App. at 25-26. The four dissenting judges reiterated the reasoning set forth in the panel decision. Pet. App. at 27-34.

4. Moore appealed to the Supreme Court of Virginia, arguing that "the Court of Appeals [of Virginia] *en banc* erred in holding that his 'arrest and search did not violate the Fourth Amendment.'" Pet. App. at 3. That tribunal, by unanimous opinion, held that the search of the defendant, based upon a constitutionally proper arrest, nevertheless "was not consistent with the Fourth Amendment." Pet. App. at 11. The court began by examining this Court's decisions in *Knowles* and *Atwater* as well as its own decision in

Lovelace v. Virginia, 522 S.E.2d 856 (Va. 1999), a decision interpreting the United States Constitution. The Virginia Supreme Court observed that *Virginia Code* § 19.2-74, unlike the statutory provision at issue in *Atwater*, did not authorize the officers to make a custodial arrest of Moore. Pet. App. at 7. After analyzing the cases, the lower court concluded that

> the officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment.

Pet. App. at 11. In other words, the court below held that the Fourth Amendment compelled suppression of the evidence because of the violation of a state statute.

SUMMARY OF ARGUMENT

In ratifying the Fourth Amendment, the Framers of our Constitution did not purport to constitutionalize the many state rules that governed the arrest authority of state officers. Instead, they were concerned with curbing arbitrary action by agents of the newly created United States, and in particular to prevent the exactions common under the writs of assistance.

While standards for Fourth Amendment reasonableness may vary depending on the particular governmental action, over the past two centuries a standard has emerged with respect to the constitutional propriety of an arrest: an arrest is reasonable under the constitution if it is made with probable cause. This standard protects the people from arbitrary exactions while affording clarity and uniformity to law enforcement. Just as the Court has declined to incorporate strictures based upon state law in assessing the constitutionality of searches, it should do the same with respect to arrests. Virginia thus simply asks this Court to adhere to the time-tested standard of probable cause, a standard that will maintain logic and consistency in the Court's jurisprudence.

As sovereign entities under our Constitution, the States are free to craft additional protections for suspects in criminal cases, so long as they do not violate constitutional limitations. Constitutionalizing these state laws will put federal courts in the undesirable position of instructing state officers on questions of state law and would make the federal judiciary the enforcer of state law. The constitutional standard governing the law of arrests would vary with each state, and thus lose the virtue of uniformity. Furthermore, a necessary adjunct of the state power to craft criminal procedure statutes is that States should be free to determine how to remedy violations of these state statutes, including state statutes that govern the law of arrests. Some States will impose suppression as a remedy for

violations of their laws, whereas other States will turn to different remedies. The remedy of exclusion of evidence, designed to vindicate violations of the United States Constitution, should not be applied to enforce state statutes, particularly when the States have not deemed this remedy appropriate. It also would be incongruous to impose the remedy of suppression of evidence based upon the violations of a state statute, when the exclusionary remedy is not compelled for violations of many federal laws.

Moore's arrest was constitutionally proper because the officers made the arrest based on probable cause. Therefore, the officers could search incident to that arrest. Once a suspect is arrested, the twin rationales of officer safety and preservation of the evidence apply. These justifications operate independently of state laws. A review of the decisions of this Court confirms the constitutional propriety of the arrest in the case at bar and of the search incident to that arrest.

Grafting the many state laws, regulations and procedures onto the probable cause standard would have undesirable consequences. First, it would inject great complexity and confusion into an area of the law that has long been settled. This Court has recognized that officers in the field benefit from straightforward, bright-line rules. A "probable cause plus" standard, requiring courts to examine state statutes in addition to probable cause, would be the antithesis of the current standard. Moreover, requiring every arrest to turn on probable cause and

any state law requirements is not necessary to protect the citizens from law enforcement. The probable cause standard protects the citizenry from arbitrary police action. Nor is there an epidemic of misdemeanor arrests that must be cured by departing from settled constitutional analysis. Indeed, constitutionalizing state statutes in this area would trigger the application of the exclusionary rule. This, in turn, would create a disincentive for States to enact such laws. As a consequence, the public could well lose the benefit of these supplemental protections currently afforded to them under state law.

ARGUMENT

I. THE CONSTITUTIONAL STANDARD OF PROBABLE CAUSE, NOT THE VAGARIES OF STATE LAW, SHOULD CONTINUE TO DETERMINE THE CONSTITUTIONALITY OF AN ARREST.

The rule Virginia urges this Court to adopt is a modest one, which would require this Court to do nothing more than reaffirm longstanding precedent: an arrest is *constitutionally* valid if it is based on probable cause. If the arrest is constitutionally valid, the Constitution does not require suppression simply because the arrest violates a provision of state law. The Court should decline to graft the myriad strictures of state law onto the historically validated probable cause standard.

A. Neither the History Behind the Adoption of the Fourth Amendment Nor Its Application in Modern Times Warrant the Incorporation of the State Law of Arrests Into the Probable Cause Standard.

1. The Fourth Amendment Was Adopted to Protect Citizens From Arbitrary Police Action, Not to Govern the Minutia of an Officer's Arrest Authority Under State Law.

The debate surrounding the adoption of the Bill of Rights does not evince any concern that officers might conduct arrests in violation of particular state laws governing arrests – which is unsurprising, since the Bill of Rights did not apply to the States. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). Rather, the "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). "There is no historical evidence that the Framers or proponents of

the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers.'" *Atwater*, 532 U.S. at 339-40.[4] Instead, "the purpose of the Fourth Amendment was to protect the people of the United States against *arbitrary action* by their own Government." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (emphasis added).[5]

Moore's arrest, although problematic as a matter of state statutory law, bears no resemblance to the evils that prompted the ratification of the Fourth Amendment. The requirement of probable cause as a precondition for an arrest protects the citizenry from the type of arbitrary exactions visited upon the colonists. The existing standard satisfies the purpose that motivated the ratification of the Fourth Amendment.

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[4] *See also United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring).

[5] *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (noting that the purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals").

2. The Modern Jurisprudence of this Court Has Upheld as Reasonable Arrests That Are Based on Probable Cause.

Although "[t]he touchstone of the Fourth Amendment is reasonableness," *United States v. Knights*, 534 U.S. 112, 118 (2001), the constitutionality of an arrest does not turn on amorphous considerations of reasonableness. "It is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996) (holding that a traffic stop was proper when based on probable cause and that a further assessment of reasonableness was unnecessary).[6] The Court has consistently refused to

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[6] *See also Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *Atwater*, 532 U.S. at 354 ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (describing probable cause as "the constitutional prerequisite for an arrest."); *Watson*, 423 U.S. at 417-24 (upholding as constitutional warrantless arrests based on probable cause); *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[.]");

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dilute or expand the standard of probable cause in favor of a broader "reasonableness" inquiry.[7]

"The requirement of probable cause has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). The "long-prevailing standards" of probable cause have embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar*, 338 U.S. at 176. The probable cause standard "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment. . . ." *Dunaway*, 442 U.S. at 213. The Court should hold fast to this wisdom.

To be sure, in other contexts, Fourth Amendment reasonableness has imposed different requirements. For instance, in the context of inventory searches or traffic checkpoints, courts assessing the

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Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (upholding arrests based on the "long-prevailing" standard of probable cause).

[7] *See Whren*, 517 U.S. at 817 (holding that traffic stop was proper when based on probable cause and that a further assessment of reasonableness was unnecessary); *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (declining to abolish probable cause in favor of a multi-factor balancing test to determine the constitutionality of an arrest).

reasonableness of a search under the Fourth Amendment will examine state law, policies, regulations and procedures. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding drunk driving checkpoints). *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding inventory searches). Tethering such suspicionless searches to state policies, procedures, regulations or statutes ensures that police are engaged in the legitimate function of carrying out an inventory or a checkpoint rather than as "a ruse for general rummaging in order to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990). Unlike inventory or traffic checkpoint searches, the requirement of probable cause precludes the government from engaging in suspicionless rummaging. In the context of inventory searches or traffic checkpoints, the statute, policy or regulation ensures that the inventory search or the traffic checkpoint is reasonable for Fourth Amendment purposes, just as the probable cause requirement ensures that an arrest is reasonable under the Fourth Amendment. *See Opperman*, 428 U.S. at 376 (noting that inventory searches conducted pursuant to standard police procedures are reasonable); *Sitz*, 496 U.S. at 455 (drunk driving checkpoint based on specific guidelines was reasonable under the Fourth Amendment).

With respect to arrests, state law is relevant to the *application* of the probable cause standard, but it does not supply the standard itself. For example, a

particular act may constitute a crime in one State but not in another. Therefore, an officer who has probable cause to believe that a suspect has violated a particular statute may properly arrest in the State that has enacted such a statute, but may not arrest in a
State where that statute does not exist. State law operates as a factual backdrop to the application of the standard mandated by the United States Constitution. However, the probable cause standard itself is a creature of the United States Constitution rather than of state law. Another illustration of this phenomenon outside of the Fourth Amendment context are the cases under *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, state law defines the crime, but the Due Process standard flows from the Constitution itself. That standard, derived independently of the underlying law, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

In sum, while the Fourth Amendment standards may differ depending on the particular government action, in assessing the constitutionality of an arrest, this Court has unswervingly concluded that "a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004).

B. This Court Has Previously Declined to Incorporate State Law in Assessing the Constitutionality of *Searches* and It Should Do So Again With Respect to the Constitutional Law of *Arrests*.

The judgment below requires courts to examine, in addition to probable cause, whether the arrest occurred in conformity with state laws governing arrests. With respect to searches, this Court has held that the constitutional standard must operate independently of state law. In evaluating the admissibility of wiretap evidence obtained by state officers, this Court concluded that if a Fourth Amendment violation has occurred, it does not matter that the officers were state officers rather than federal officers. *Elkins v. United States*, 364 U.S. 206, 223 (1960). "[T]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 223-24.

More recently, the Court rejected the argument "that [a defendant's] expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of [State] law." *California v. Greenwood*, 486 U.S. 35, 43 (1988). This Court acknowledged that States could impose more stringent constraints on the police than those imposed by the United States Constitution, but noted that it "had never intimated, however, that whether or not a search is reasonable

within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.*

Given the holdings in *Greenwood* and *Elkins*, "it would be incongruous to use state law to determine whether the exclusionary rule should apply to a search incident to arrest, but to use federal law to determine whether the exclusionary rule should apply to all other searches." *United States v. Wright*, 16 F.3d 1429, 1436 (6th Cir. 1994). Adhering to the probable cause standard would thus preserve the consistency of this Court's Fourth Amendment jurisprudence.

II. THE HOLDING BELOW IS INCOMPATIBLE WITH OUR CONSTITUTIONAL SYSTEM OF DUAL SOVEREIGNTY.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The States thus retain substantial sovereign authority under our constitutional system." *Id.* This residuum of sovereignty means that States remain free to enact certain policy choices into law – and to decide how to remedy violations of these laws – so long as they do not infringe on the protections afforded by the National Constitution.

A. Incorporating State Law Into the Constitutional Standard for Arrests Will Place Federal Courts in an Improper Supervisory Role Over Questions of State Law.

Under the decision below, the constitutionality of an arrest often will turn on a question of state law. If this standard were adopted, federal courts adjudicating habeas cases filed under 28 U.S.C. § 2254 and in civil rights cases under 42 U.S.C. § 1983, inevitably would have to "instruct[] state officials on how to conform their conduct to state law." *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). "[S]uch a result conflicts directly with the principles of federalism." *Id.* "[I]t is difficult to think of a greater intrusion on state sovereignty." *Id.* The decision below also turns dual sovereignty on its head by pressing the United States Constitution into the service of a state statute. If "state law can transform constitutional police conduct into its opposite," it would "unravel our federal system, since treating a state law as a violation of the Constitution 'is to make the federal government the enforcer of state law.'" *California v. McKay*, 41 P.3d 59, 65 (Cal. 2002).[8]

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[8] *See also Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988).

B. The Judgment Below is Irreconcilable With a Uniform Constitutional Standard That Applies to all States.

There is an "important need for uniformity in federal law," *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The lower court's rationale would inject widespread and anomalous variations in the law because the scope of constitutional protection from arrest would advance or recede based on a State's boundaries. Persons in Virginia would benefit from greater national *constitutional* protections, by virtue of the existence of *Virginia Code* § 19.2-74, than would residents of States that do not have a misdemeanor summons statute. Indeed, there likely would be two constitutional standards within a single State: the same arrest may be unconstitutional if made by a Virginia officer, but ruled constitutional if made by a federal officer, who is not subject to *Virginia Code* § 19.2-74.[9] Furthermore, if adopted, the standard below would signify that each time a state legislature convened, it could modify the *constitutional* standard by enacting state legislation governing the conduct of the officers of that State.

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[9] Under the Supremacy Clause, any contrary federal law would clearly override state law governing the conduct of its officers. U.S. CONST. art. VI, cl. 2. *Cf. Printz v. United States*, 521 U.S. 898, 933 (1997) (State law enforcement cannot be commandeered to enforce federal law).

C. If States Afford Criminal Defendants Safeguards Beyond the National Constitutional Minimum, Those Safeguards Operate Separately From the National Constitution Itself.

Although "a State is free *as matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," a State "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). In a host of areas, the States, including Virginia, have imposed additional safeguards for criminal defendants. *See* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALBANY L. REV. 1183 (2000).[10] For example, Virginia has enacted a strict speedy trial statute,[11] has provided for discovery by defendants in criminal cases,[12] and has

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[10] *See also* Susan King, *State Constitutional Bibliography: 1989-1999*, 31 RUTGERS L.J. 1623 (2000) (summarizing research on State Constitutional Law by State and topic).

[11] *Virginia Code* § 19.2-243 (requiring dismissal with prejudice if an incarcerated defendant is not brought to trial within five months of a preliminary hearing or within nine months of the preliminary hearing if the defendant is not incarcerated pre-trial). *Cf. Barker v. Wingo*, 407 U.S. 514, 530 (1972) (setting fourth a multi-factor test for assessing speedy trial violations under the United States Constitution).

[12] *See* VA. S. CT. RULES 3A:11, 7C:5 and 8:15 (allowing limited discovery in criminal cases). In contrast, "[t]here is no

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established multiple layers of appellate review in criminal cases.[13] These provisions are not mandated by the National Constitution, but simply represent a policy choice on the part of the Virginia General Assembly.

Similarly, the remedies for violating these provisions should be the resort of state law rather than matters of Constitutional magnitude. The States, who draft these criminal procedure statutes, should have the prerogative of determining how violations of these statutes will be punished. *See Greenwood*, 486 U.S. at 44 (noting that a State could eliminate the exclusionary rule as a remedy for violations of state law). To one State, the violation of a particular procedure may seem especially egregious, and that state can provide a stringent remedy, such as the exclusionary rule. For example, if a State wishes to require the suppression of evidence seized outside of an officer's jurisdictional boundary, or because the officer should have issued a summons instead of making an arrest, a State can so provide.[14]

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general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

[13] *See, e.g.*, VA. S. CT. RULES Part 5 and 5A. Of course, the United States Constitution does not provide a right to an appeal in a criminal case. Rather, "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney v. United States*, 431 U.S. 651, 656 (1977). *See also McKane v. Durston*, 153 U.S. 684, 687 (1894).

[14] *New Mexico v. Bricker*, 134 P.3d 800, 805-08 (N.M. Ct. App. 2006) (New Mexico Constitution required suppression even

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Another State may conclude that the violation of a particular state statute should be remedied through administrative hearings or through the tort system – or that a particular statute or regulation supplies a guideline only, for which there is no remedy.

The decision concerning when the suppression remedy is appropriate for violations of state law should remain with the states. Subject to the limitations of the United States Constitution, the States may experiment with their laws. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). While the Constitution allows the States to experiment, it does not penalize the States if they fail to follow their own self-imposed rules. The Constitution's exclusionary rule penalizes federal constitutional violations, *see Elkins*, 364 U.S. at 217,[15] not violations of state law. Although a State

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if United States Constitution did not); *Nevada v. Bayard*, 71 P.3d 498, 503 (Nev. 2003) (evidence seized following arrest that contravened misdemeanor arrest statute must be suppressed under the Nevada constitution); *Ohio v. Brown*, 792 N.E.2d 175, 177 (Ohio 2003) (Ohio Constitution provided greater protection than United States Constitution and, therefore, evidence seized after wrongful arrest for minor misdemeanor must be suppressed); *Montana v. Bauer*, 36 P.3d 892, 897 (Mont. 2001) (arrest improper under Montana law when offense carries no jail time and evidence seized incident to the arrest must be suppressed).

[15] *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). *See also United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992) ("[T]he exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law.").

may provide a suppression remedy for violations of state law, the Constitution does not. To say otherwise is to ignore the division of sovereignty between the States and the National Government that is "a defining feature of our Nation's constitutional blueprint." *Federal Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 751 (2002).

To illustrate, the current remedy for violations of Virginia's speedy trial statute is dismissal with prejudice of the charges. *Virginia Code* § 19.2-243. However, Virginia could employ a different remedy if it so chose or even repeal the statute altogether. Virginia could allow compensatory damages, sanctions against the prosecutor, or some other mechanism to remedy violations of its statute. So long as Virginia did not infringe on the defendant's constitutionally protected rights, it could implement whatever remedy the legislature deemed appropriate. The same principle should apply regarding the law of arrests.

With respect to the misdemeanor-summons statute, the remedy available to a wrongfully arrested suspect under Virginia law is a civil action in tort for false arrest, rather than application of an exclusionary rule. *See Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1988) (discussing false arrest tort).[16] Furthermore, under longstanding Virginia law, citizens have the right to resist an illegal arrest.

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[16] *See also DeChene v. Smallwood*, 311 S.E.2d 749, 751 (Va. 1984) (same).

Virginia v. Hill, 570 S.E.2d 805, 808 (Va. 2002) (noting right under Virginia law, rooted in the common law, to resist an illegal arrest).[17] A Virginia officer who chooses to flout *Virginia Code* § 19.2-74, therefore, acts at his own peril.[18] Thus, Virginia law provides time-honored remedies for arrests made in violation of its laws, even though the remedies do not include suppression.[19]

D. The Constitution's Exclusionary Rule Should not be Extended to Vindicate State Statutes.

The purpose of the exclusionary rule is to deter violations of *constitutional* rights. *See Elkins*, 364 U.S. at 217. Absent the state statute at issue, there would be no question that Moore's arrest was proper. *Atwater*, 532 U.S. at 354-55. Moore conceded at trial that he had a suspended license and, thus, the

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[17] *See also McCracken v. Virginia*, 572 S.E.2d 493, 497 (Va. Ct. App. 2002) (same).

[18] Although not addressed in the opinion below, Virginia law provides a parallel misdemeanor-summons statute for traffic offenses, *Virginia Code* § 46.2-936. This statute specifies an even more draconian remedy. Any officer who violates *Virginia Code* § 46.2-936 is "guilty of malfeasance in office" and can be removed "upon complaint filed by any person in a court of competent jurisdiction."

[19] In Virginia, "absent an express statutory provision for suppression," *Troncoso v. Commonwealth*, 407 S.E.2d 349, 350 (Va. Ct. App. 1991), "searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression." *Id.*

officers had probable cause to arrest. J.A. at 19. Holding that the Constitution requires suppression under such circumstances would inappropriately expand the scope of the exclusionary rule beyond its doctrinal foundation of vindicating constitutional interests. Furthermore, there is no justification for automatic suppression following violation of a state statute when suppression is not automatically required for violations of federal treaties, statutes, or regulations.[20]

The fact that an arrest is authorized by statute will not prevent suppression if the arrest violates the Constitution. *Elkins*, 364 U.S. at 217. Conversely, as long as the arrest conforms to the Constitution, because the arrest is based on probable cause, the absence of statutory authority under state law to make an arrest should not trigger suppression under the Constitution. For example, there is no statutory authority for private persons to trespass onto private property, remove evidence and take it to the police. Yet, the actions by such third parties would not trigger the suppression of this evidence. *Bourdeau v. McDowell*, 256 U.S. 465, 476 (1921). Just as the presence of authority will not salvage an

[20] *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680-82 (2006) (suppression not an appropriate remedy for a violation of the Vienna Convention on Consular Relations); *United States v. Donovan*, 429 U.S. 413, 432-32 n.22 (1977) (denying exclusion for violation of wiretapping statute); *United States v. Caceres*, 440 U.S. 741, 755 (1979) (violation of IRS eavesdropping regulation did not require suppression).

unconstitutional arrest, the absence of authority under state law should not require the suppression of evidence obtained following an arrest that is constitutional because it is founded on probable cause.

The suppression of evidence should be a last resort, not a first impulse. *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006). Among other things, the Constitution's exclusionary rule exacts "substantial social costs," including the release of dangerous criminals. *Id.* at 2163. Instead of promoting respect for the law, if the exclusionary rule is "applied indiscriminately[,] it may well have the opposite effect of generating disrespect for the law and administration of justice." *Stone v. Powell*, 428 U.S. 465, 491 (1976). Where a State has not deemed it appropriate to implement a state law exclusionary rule as a deterrent for a violation of its own law, the constitutional remedy of exclusion of evidence should not be forced upon the States.

III. UNDER THIS COURT'S JURISPRUDENCE, THE OFFICER'S SEARCH OF MOORE INCIDENT TO HIS ARREST WAS CONSISTENT WITH THE FOURTH AMENDMENT.

A. An Officer Can Search Incident to an Arrest That Is Lawful Under the Constitution.

A search incident to arrest is permissible if based on a "lawful" arrest. *Robinson*, 414 U.S. at 224.[21] In *Robinson*, the Court specified what it meant by a "lawful" arrest: "[A] custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* at 235. As Professor LaFave notes, the phrase "lawful custodial arrest" in these cases "refers not to the limitations of state law but rather to an overarching principle that all it takes to make a custodial arrest reasonable in a Fourth Amendment sense is that it be based on probable cause." 1 Wayne R. LaFave, *Search and Seizure*, § 1.5B (4th ed. 2004).

Furthermore, once an officer has made a constitutionally valid arrest, the officer can search incident to that arrest. "Conditioning a search incident to arrest on the degree to which an otherwise

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[21] *See also Preston v. United States*, 376 U.S. 364, 367 (1964); *Harris v. United States*, 331 U.S. 145, 151 (1947).

constitutional arrest complies with state procedure . . . makes no sense." *McKay*, 41 P.3d at 70. The justifications for searches incident to arrest are the need to protect the safety of the officer – and other suspects – and preserving evidence justify a search incident to a constitutionally permissible arrest. *Knowles*, 525 U.S. at 116. Neither of these rationales depends upon the arrest's compliance with state law. Finally, if the arrest is constitutional, because it is based on probable cause, there is no "poisonous tree" from which the fruit must be suppressed.

B. This Court Has Never Held That a Violation of State Law Renders an Arrest *Constitutionally* Unlawful.

1. *Atwater* and *Knowles* Are Inapplicable to the Issue of Whether the Constitution Requires Suppression Because the Arrest Violates State Law.

The lower court, relying on this Court's decisions in *Atwater* and *Knowles,* concluded that the search incident to arrest violated Moore's rights under the United States Constitution. Pet. App. at 11. Those cases are inapplicable to the issue presented in the case at bar. In *Knowles*, this Court held that the Constitution could not support a search incident to the issuance of a citation, because the concerns underlying the search incident to arrest – officer safety and the need to preserve evidence for trial – do not apply to a situation where the officer issued a

citation. 525 U.S. at 118-19. Here, however, the officers were not issuing a citation; they made a full custodial arrest. Therefore, *Knowles* sheds no light on the present case.

In *Atwater*, this Court held that a full custodial arrest for a seatbelt violation did not violate the United States Constitution. *Atwater*, 532 U.S. at 354-55. While the Texas statute at issue authorized the officer to make a full custodial arrest, the decision did not turn on that fact. *Id.* at 323, 354. Given the background of state law in *Atwater*, the issue presented by *Moore* was not present.

Atwater does, however, support the position of Virginia in several important respects. After an in-depth examination of the historical evidence, the Court concluded that "[n]either the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or traditionally has been read" to preclude an arrest for a minor offense. *Id.* at 336. The offense at issue in *Atwater* was a non-jailable seatbelt violation. *Id.* at 323. In contrast, in the case at bar, the officers had probable cause to believe Moore had committed a crime punishable by a maximum sentence of 12 months in jail.[22] The Court further concluded that the balancing tests urged by the defendant were

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[22] *Virginia Code* § 46.2-301 (driving on a suspended license a Class 1 misdemeanor); *Virginia Code* § 18.2-10 (Class 1 misdemeanors punishable by up to 12 months in jail).

impracticable, particularly when compared with the simplicity of the longstanding probable cause test. *Id.* at 346-54. *Atwater* thus provides strong support for the standard Virginia urges this Court to re-affirm.

2. Neither *Di Re* nor *DeFillippo* Command the Constitutional Remedy of Suppression for a Mere Violation of State Law.

Neither *United States v. Di Re*, 332 U.S. 581 (1948), nor *DeFillippo*, 443 U.S. 36, lend support to the view that the constitution requires suppression of the fruits of a search for an arrest that is based upon probable cause, but the arrest violates a state statute. In *Di Re*, this Court reversed a federal conviction for possession of counterfeit gasoline coupons. *Di Re*, 332 U.S. at 582. The United States argued that the search could be justified as a search incident to the arrest. *Id.* at 587. The Court held that "in the absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines it." *Id.* at 589. In so holding, the Court drew from a federal statute, since amended, which provided that an arrest *by judicial process* for a federal offense must be made "agreeably to the usual mode of process against offenders in such State." *Id.* at 589.[23] The Court reasoned that if federal statutory law required

[23] The successor statute does not require that an arrest be agreeable to the usual state process. 18 U.S.C. § 3041.

compliance with state law for arrests *with a warrant*, federal courts should logically turn to state law to determine the validity of arrests *without a warrant*. *Id.* at 589-90. Since the arrest in *Di Re* was invalid under New York law, the Court held that the fruits of the search incident to arrest should be suppressed. *Id.* at 595.

First, as the text of *Di Re* shows, and as a number of courts have concluded, the decision was grounded not in the United States Constitution but on the supervisory power of this Court to exclude evidence under circumstances deemed improper but not unconstitutional.[24] Second, as several appellate courts have recognized, the holding in *Di Re* is no longer valid in light of the Court's subsequent holdings in *Elkins*, 364 U.S. at 224, and *Greenwood*, 486 U.S. at 43-44.[25]

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[24] *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67; *Street v. Surdyka*, 492 F.2d 368, 373 n.7 (4th Cir. 1974). *See also* LaFave, *Search and Seizure* at § 1.5 ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations' ").

[25] *See Wright*, 16 F.3d at 1434-36; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67. In this connection, *United States v. Garcia*, 462 U.S. 1127 (1983), is worth noting. The Fifth Circuit had ordered evidence suppressed because the seizure of marijuana from the defendants' truck contravened the officers' arrest authority under Texas law. *United States v. Garcia*, 676 F.2d 1086, 1093-94 (5th Cir. 1982). Under Texas law, the game warden's authority was limited to state parks and to violations of hunting laws, but the officer made the arrest outside of the state park, for an offense not connected to hunting laws. *Id.* This

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In *Johnson v. United States*, 333 U.S. 10 (1948), this Court concluded that the evidence must be suppressed because the officers made a warrantless entry of a hotel room when no exigent circumstances were present. *Id.* at 12-15. The United States asked the Court to uphold the search on the basis of a search incident to arrest. *Id.* at 15. In a footnote, the Court cited *Di Re* for the proposition that "[s]tate law determines the validity of searches without warrant." *Id.* at 15 n.5. *Johnson* thus mentions, in passing, the prudential rule announced in *Di Re* to govern the conduct of federal law enforcement. It does not purport to transform *Di Re*'s non-constitutional holding into a constitutional rule.

Furthermore, the Court held that the officers lacked probable cause to make the arrest until they gained entry into the defendant's hotel room and, therefore, the officers could not rely on the facts gleaned from the illegal entry to justify the arrest or the search incident to arrest. *Johnson*, 333 U.S. at 16-17. Thus, the admissibility of the incriminating evidence did not turn on state law, but rather on the fact that the officers lacked probable cause. This footnote in *Johnson*, in addition to reiterating the prudential doctrine announced in *Di Re*, is

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Court reversed and remanded in light of *United States v. Ross*, 456 U.S. 798 (1982) (holding that an officer who has probable cause to search an automobile may search compartments in the automobile). *Garcia*, 462 U.S. at 1127. This result cannot be reconciled with *Di Re* if *Di Re* announced a constitutional rule.

also dicta. The Court is not bound by such dicta. *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

DeFillippo also is inapposite. The Court ultimately held that even if an ordinance is later held unconstitutional, an officer can reasonably rely on it to affect an arrest, 443 U.S. at 40. The Court stated in passing that, "whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* State law "is relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." *Id.* In other words, probable cause is the constitutional standard, but state law defines the crime for which the officer must have probable cause. *See Ryan v. County of DuPage*, 45 F.3d 1090, 1093 (7th Cir. 1995). Moreover, the statement in *DeFillippo* is again dicta, because the defendant did "not contend that the arrest was not authorized by Michigan law." *DeFillippo*, 443 U.S. at 36.

In the years since this Court in *Mapp* applied the Constitution's exclusionary rule to the States, this Court has "*never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of custody was deemed unnecessary (as a matter of state law or otherwise)." 1 Wayne R. LaFave, *Search and Seizure,* at § 1.5(b) (emphasis in original). Because the arrest conformed to the Constitution, the officer could search incident to that arrest.

C. Relying on This Court's Jurisprudence, the Lower Courts Overwhelmingly Have Rejected the Rationale of the Supreme Court of Virginia.

Most of the United States Courts of Appeals have rejected the argument that officers who arrest based on probable cause, but violate a state statute governing the arrest, act in violation of the United States Constitution.[26] This consensus provides

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[26] *See United States v. Van Metre*, 150 F.3d 339, 346-47 (4th Cir. 1998) (confessions were admissible even though the arrest violated Tennessee law, which required police to obtain a fugitive of justice warrant; at the time of the arrest the officers had three valid warrants); *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (arrest for operating a bicycle without a headlight violated Iowa law but not the United States Constitution because it was based on probable cause); *Wright*, 16 F.3d at 1437 (stricter requirements of Tennessee law for warrantless arrests irrelevant where officers had probable cause; therefore, suppression of drug evidence seized from defendant's rental car not required); *Walker*, 960 F.2d at 415-17 (methamphetamine need not be suppressed if officers had probable cause to arrest; whether arrest violates Texas law irrelevant for purposes of constitutional analysis). Some courts, before *Atwater*, have ruled otherwise. *See United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993); *contra Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990) (concluding that the violation of a California statute in making the arrest was irrelevant to Fourth Amendment analysis, which turned on the existence of probable cause); *United States v. Trigg*, 878 F.2d 1037, 1041 (10th Cir. 1989) (reasonableness of arrest for misdemeanor depends on probable cause and strictures of state law and customary practices); *contra United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (under state law, officers should not have arrested defendant for a misdemeanor that did not occur in the officers' presence;

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persuasive authority for reversing the decision below. Similarly, when confronted with a 42 U.S.C. § 1983 action alleging that the Fourth Amendment was violated because an arrest was impermissible under state law, a strong consensus has emerged among federal appellate courts rejecting the argument that an arrest that was improper under state law and rendered the arrest unconstitutional under the Fourth Amendment.[27] Finally, state courts that have considered the issue have rejected a "probable cause plus" standard that would incorporate state law.[28]

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however, since arrest was founded upon probable cause, suppression of sawed-off shotgun was not required).

[27] *See Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002) (arrest for misdemeanor assault that did not occur in officer's presence violated state law but not federal law; § 1983 lawsuit was dismissed because "[t]here is no federal right not to be arrested in violation of state law."); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (section 1983 relief unwarranted because officers acted with probable cause; Puerto Rico rule of court prohibiting arrest for misdemeanors that do not occur in the officer's presence did not affect constitutional standard); *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (fact that defendant was entitled to a hearing under Illinois law to challenge his removal as a trespasser was irrelevant; officers did not face § 1983 liability when their arrest was made with probable cause); *Anderson v. Haas*, 341 F.2d 497, 498-99 (3rd Cir. 1965) (in civil rights action, district court erroneously concluded that validity of officer's arrest hinged on state law). *But see Malone v. County of Suffolk*, 968 F.2d 1480 (2nd Cir. 1992) (citing *Di Re* among other authorities for the proposition that the constitutionality of an arrest can be assessed according to state law in a § 1983 action).

[28] *See New Hampshire v. Smith*, 908 A.2d 786, 790 (N.H. 2006) (arrest was not unconstitutional even though it was made outside of jurisdictional boundary as defined by state law); *McKay*, 41 P.3d

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This Court should reaffirm the constitutional validity of an arrest that is founded on probable cause, whether or not the arrest infringes on some provision of state law. "The test is one of federal law, neither enlarged by what one state court [or legislature] may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins*, 364 U.S. at 224.

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at 65-72 (defendant's arrest for riding a bicycle in the wrong direction on a residential street violated state law, but because arrest was based on probable cause it did not violate the United States Constitution); *Michigan v. Hamilton*, 638 N.W.2d 92, 97-98 (Mich. 2002) (evidence seized by police outside the territorial limit of their authority violated state law but did not violate the Constitution); *Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998) (liquor control officers lacked statutory authority to arrest in this specific situation but suppression was unwarranted because officers had probable cause to arrest); *Maine v. Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (rejecting argument that arrest beyond territorial jurisdiction as defined by state law violated the United States Constitution); *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (defendant's arrest was improper under state law because he was not provided notice to challenge misdemeanor complaint; however, suppression of witness's identification must be denied because the arrest was made with probable cause); *Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (arrest made beyond officer's territorial jurisdiction did not violate the United States Constitution even if it violated state law); *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973) (offense of driving under the influence did not occur in officer's presence and, therefore, violated state law; nevertheless, suppression was not warranted because the officer acted with probable cause and thereby satisfied the National Constitution).

IV. THE DECISION BELOW IS IMPRACTICAL AND UNNECESSARY FROM A POLICY STANDPOINT.

A. Grafting State Law Strictures Onto the Simple Probable Cause Standard Would Inject Needless Complexity Into the Law.

At present, the probable cause standard, unfettered by further state law requirements, has the virtue of simplicity, clarity and uniformity. *See Texas v. Brown*, 460 U.S. 730, 742 (1983) (noting that "probable cause is a flexible, common-sense standard.").[29] In contrast to the simple, well-established rule of probable cause, constitutionalizing the myriad state rules governing arrests would inject considerable complexity and uncertainty into the constitutional law of arrest. Some States, like Virginia, have restricted an officer's arrest authority with respect to misdemeanor offenses.[30] An officer's authority might be limited to a particular category of offense. For example, a game warden might be limited to making arrests for

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[29] *See also Brinegar*, 338 U.S. at 176 ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . opposing interests. Requiring more would unduly hamper law enforcement.").

[30] *See Iowa Code* § 805.16 (mandating release on a summons for certain offenses); *Kentucky Rev. Stat.* § 431.015 (same); *Nebraska Rev. Stat.* § 29-435 (same); *New Mexico Stat.* § 66-8-123 (same); *Ohio Rev. Code* § 2935.26 (same).

hunting offenses.[31] An officer tasked with enforcing the laws relating to alcohol may have arrest authority limited to that particular sphere.[32] A police officer's authority might be limited to a particular geographic area.[33] Other restrictions on the authority to arrest might stem from regulations, local policies and practices, or orders from within the police hierarchy. These regulations might restrict, for example, the authority of police officers who work off-duty in shopping malls or night clubs.[34]

If this Court adopted a "probable cause plus state law" standard, a host of questions would arise. Would all state criminal procedure statutes governing arrests be incorporated into the expanded Constitutional standard, or only certain statutes? If so, which ones? For example, would statutes limiting arrests to a particular jurisdiction require suppression of evidence seized incident to an arrest that occurs outside that territory? A number of statutes require officers making

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[31] *See Garcia*, 676 F.2d at 1093-94 (discussing limited arrest authority of Texas game wardens), *rev'd by Garcia*, 462 U.S. at 1127.

[32] *See Droste*, 697 N.E.2d at 623 (discussing restricted arrest authority of liquor control investigators).

[33] *See, e.g.*, *Smith*, 908 A.2d at 790; *Hamilton*, 638 N.W.2d at 97-98; *Jolin*, 639 A.2d at 1064; *Hamilton*, 666 P.2d at 157.

[34] *See Virginia Code* § 15.2-1712 (authorizing municipal governments to enact ordinances permitting local police to work off-duty, including to exercise their arrest powers, and further permitting municipalities to allow police departments to promulgate "reasonable rules" governing off-duty employment).

an arrest to wear a uniform and/or to display a badge of authority.[35] Would a failure to display the badge or to wear a uniform require suppression? Would federal officers be bound by these state statutes and regulations, particularly when the federal officers are cross-designated with state arrest authority?[36] Would federal courts be required to consult these state statutes when state law enforcement officers testify in federal court? Which law would control when the prosecution occurs in one state but evidence was obtained in violation of the law of a sister state? Would any defenses be applicable, and, if so, which ones? Would a violation of regulations and policies adopted by local governments or police departments provide grounds to challenge an arrest as

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[35] *See Montana Code Ann.* § 61-8-703 (2007) (authorizing arrest for speeding if the officer is in uniform or displays his badge of authority); *Nebraska Rev. Stat.* § 60-6, 192 (2007) (permitting arrests for speeding if the officer, *inter alia*, "[i]s in uniform and displays his or her badge of authority"); *North Dakota Cent. Code* § 39-03-15 (2007) (authorizing warrantless arrests when speeding is determined by radar, provided the officer "is in uniform or displays the officer's badge of authority"); *Virginia Code* § 46.2-102 (generally requiring officers in traffic cases to be uniformed or to display a badge of authority).

[36] Cross-designation of state and federal officers is a common practice. *See, e.g.,* Federal Bureau of Investigation, St. Louis Metro. Fugitive Task Force, http://stlouis.fbi.gov/coordination.htm (last visited Oct. 30, 2007) (noting that, in an effort to combat violent crime, "[e]ach federal officer has been cross-designated as a peace officer in the state of Missouri.").

unconstitutional, or would the constitutionality of an arrest be limited to state statutes?

Jurisprudential questions aside, a host of practical difficulties would arise. Under state misdemeanor-summons statutes, it will often be unclear whether the crime at issue is a misdemeanor or a felony. For example, under Virginia law, theft of an item worth more than $200 is a felony, *Virginia Code* § 18.2-95, for which an officer may effect a full custodial arrest. On the other hand, theft of an item valued at less than $200 is petit larceny, a Class 1 misdemeanor, *Virginia Code* § 18.2-96, for which a summons is generally required. *Virginia Code* § 19.2-74. The value of an item often is not immediately apparent to the arresting officer. Or an officer may in good faith make an erroneous judgment about the propriety of an arrest under one of the exceptions to the misdemeanor summons statute. Other States no doubt have similar exceptions that will dramatically increase the complexity of arrests as well suppression hearings.

Statutes linking the power to arrest to jurisdictional boundaries within a State can have their own complexities. For example, *Virginia Code* § 19.2-250 provides that an officer's jurisdiction extends to one mile beyond his jurisdictional boundary,

> except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess

> of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.

For investigations that cross state lines, officers would have to determine which State's law of arrest should govern.

This Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-14. Re-affirming the probable cause standard would ensure continuing uniformity and simplicity in all state and federal courts. In contrast, importing state law, regulations and policies into the constitutional analysis of an arrest will prove very difficult to administer not only for courts but also for officers who must make difficult decisions "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S. at 347. The Court should decline to cast aside

the time-tested probable cause standard in favor of some unproven and far more complex standard.

B. Constitutionalizing State Laws Governing Arrests Is not Necessary to Protect the Citizenry and May Well Prove Counterproductive.

Refusing to graft state law strictures onto the probable cause standard will not leave the citizenry at the mercy of overzealous law enforcement. First, any arrest must be based upon probable cause. This standard provides a safeguard against arbitrary action by the police. "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.'" *Pringle*, 540 U.S. at 370.[37] Suppression motions are granted on a routine basis when law enforcement act without probable cause in the case of an arrest, or without reasonable suspicion while making a *Terry*[38] stop. In addition, state officers are also held accountable through whatever remedies the States have seen fit to impose for violations of their particular statutes.

Second, with respect to misdemeanor-summons statutes, the Nation is not "confronting anything like an epidemic of unnecessary minor-offense arrests" owing, in part, to the "good sense" of law enforcement

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[37] *See also Brinegar*, 338 U.S. at 176.

[38] *Terry v. Ohio*, 392 U.S. 1 (1968).

who have neither the desire nor the resources to make full custodial arrests in every possible instance. *Atwater*, 532 U.S. at 353. Indeed, "it is in the interest of police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Id.* at 352. Therefore, any argument that the "probable cause plus" standard is necessary to protect the people is without merit.

That the probable cause standard is adequate to protect the citizenry can be seen in the disposition of the issue in the case at bar by the lower courts. As noted above, state and federal courts that have addressed the issue have overwhelmingly concluded that an arrest that is based on the probable cause is constitutional, regardless of any strictures of state law. This conclusion has not placed citizens in those jurisdictions at the mercy of rampant exactions at the hands of their state governments.

In the long term, it is far from obvious that constitutionalizing state criminal procedure statutes on the subject of arrest would amount to a triumph for civil liberties. At present, the States are free to impose strictures on their officers' powers of arrest and can determine how to punish an officer who violates those strictures. Constitutionalizing those laws would mandate the suppression remedy. State legislatures will be more reluctant to enact such laws if the cost is the suppression of relevant evidence and the release of dangerous criminals. The net result of extending the applicability of the exclusionary rule is

likely to be an erosion of state law protections rather than a strengthening of those protections.

This Court's experience with constitutional standards in the context of procedural due process challenges to prison regulations is instructive. In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court adopted a methodology for assessing the creation of liberty interests that examined whether "mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's conditions of confinement." *Sandin v. Conner*, 515 U.S. 472, 481 (1995). After experiencing growing frustration with this methodology, this Court found that detailed oversight of these regulations "creates disincentives for States to codify prison management procedures in the interest of uniform treatment." *Id.* at 482.

> Prison administrators need be concerned with the safety of the staff and inmate population. Ensuring that welfare often leads prison administrators to curb the discretion of staff on the front line who daily encounter prisoners hostile to the authoritarian structure of the prison environment. Such guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents. The approach embraced by *Hewitt* discourages

> this desirable development: States may avoid creation of "liberty" interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."

Id. In similar fashion, if the state statutes, regulations and policies that govern the arrest authority of state officers triggered the application of the exclusionary rule, it would create perverse incentives for the States to avoid such restrictions. States will instead either avoid such laws altogether or they will confer on their officers a standardless discretion that is neither desirable from the viewpoint of the State nor of the citizens who encounter law enforcement.

CONCLUSION

For the reasons stated above, and in the amici briefs supporting Virginia, the judgment of the Supreme Court of Virginia should be **REVERSED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

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COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF FOR THE RESPONDENT

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Place, NW
Washington, D.C. 20016

S. Jane Chittom
Counsel of Record
Stacie A. Cass
OFFICE OF THE APPELLATE
DEFENDER
701 E. Franklin St., Ste. 1001
Richmond, VA 23219
(804) 225-3598

Thomas C. Goldstein
Steven C. Wu
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave.,
NW
Washington, D.C. 20036

December 3, 2007

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an arrest (and incident search) for a nonarrestable offense is unreasonable under the Fourth Amendment because the legislature has determined that an arrest furthers no governmental interest.

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No. 06-1082

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The decision of the Supreme Court of Virginia (Pet. App. 1-11) is published at 636 S.E.2d 395 (Va. 2006). The *en banc* decision of the Court of Appeals of Virginia (Pet. App. 12-34) is published at 622 S.E.2d 253 (Va. App. 2006) (*en banc*). The panel decision of the Court of Appeals of Virginia (Pet. App. 35-56) is published at 609 S.E.2d 74 (Va. App. 2005).

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has

jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 19.2-74 of the Virginia Code provides, in pertinent part:

> A.1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such

person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT

1. Virginia law defines four classes of misdemeanor offenses. Va. Code § 18.2-11. For such offenses, the State has generally forbidden arrest. If an individual commits one of these offenses, officers may issue the individual a ticket, referred to under state law as a "summons." *Id.* § 19.2-74, 46.2-388. They may "detain[]" the individual in order to "take [his] name and address * * * and issue [the] summons." *Id.* § 19.2-74(A)(1). But, as long as the officer does not believe the individual poses a danger or will fail to comply with the summons, "[u]pon the giving by such person of his

written promise to appear at such time and place, the officer shall forthwith release him from custody." *Id.*[1]

Virginia enacted its citation arrest statute to conform to standards promulgated by the American Bar Association that called for states to subject minor offenses only to citation, not arrest. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARD 2.2 (1968). The Virginia Supreme Court sponsored, and the State financed, a study to evaluate the ABA's recommendations. The study recognized that, with the exception of provisions relating to traffic offenses, there was at that time "no other authority in Virginia authorizing a police officer to release a person charged with other offenses by the issuance of a summons or citation." RICHARD E. WALCK *ET AL.*, COMPARATIVE

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[1] The Attorney General has explained that, with respect to misdemeanors, the "citation release" statute supersedes the more general authority to arrest for an offense committed in the officer's presence. *See* 1991 Va. A.G. 127 (discussing Va. Code § 19.2-81); *see also* Va. Code § 46.2-936 (recognizing force of local court orders); *id.* § 46.2-936 (if an officer detains an individual for a motor vehicle offense "punishable as a misdemeanor," the officer shall "take the name and address of such person and the license number of his motor vehicle and issue a summons"; "Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody."); *id.* § 46.2-937 ("For purposes of arrest, traffic infractions shall be treated as misdemeanors. Except as otherwise provided by this title, the authority and duties of arresting officers shall be the same for traffic infractions as for misdemeanors."); *id.* § 19.2-76.2 (providing for the service by mail of a summons "for a violation of a county, city or town parking ordinance" or "for a violation of a county, city or town trash ordinance punishable as a misdemeanor"; even if the individual does not appear on the date specified by the summons, no arrest is permitted "of a person summoned by mailing").

ANALYSIS OF AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE WITH VIRGINIA LAWS, RULES, AND LEGAL PRACTICE II-3 (undated). The Virginia Legislature adopted the study's recommendation that "[c]onsideration should be given to making [the use of a summons] mandatory for minor offenses." *Id.* at II-4.

2. On February 20, 2003, two city police detectives detained respondent David Lee Moore for driving with a suspended license, which is a Class 1 misdemeanor under Virginia law. Va. Code § 46.2-301(C). Notwithstanding the fact that Virginia law generally forbids officers from arresting motorists for this conduct, the detectives who stopped respondent decided to make a full custodial arrest rather than write him a ticket. The officers later conceded that they had no reason to make an arrest rather than issue the summons required by law, and the State did not attempt to establish that the officers had made an innocent mistake. Rather, when asked why they did not issue a summons, one of the detectives answered that it was "[j]ust our prerogative, we chose to effect an arrest." Pet. App. 2 n.2.

The two detectives illegally handcuffed respondent, placed him in a police vehicle, and took him not to a police station but to his hotel room. There, they conducted a full search of respondent's person and found crack cocaine in his pocket. *Id.* at. 2, 14-15.

The State charged respondent with possession with intent to distribute cocaine. The trial court denied respondent's motion to suppress the fruits of the search under the Fourth Amendment. *Id.* at 37. In a bench trial, respondent was convicted and sentenced to five years imprisonment. *Id.* On respondent's appeal, a panel of the Court of Appeals of Virginia reversed (*id.*

at 42-44) but the full court reinstated the conviction by a divided vote (*id.* at 13, 27).

The Supreme Court of Virginia, in turn, unanimously held that the officers' conduct violated the Fourth Amendment. The court rejected petitioner's assertion that the search of respondent's person was constitutional because it was conducted incident to an arrest supported by probable cause. *Id.* at 6-7. That argument, the court explained, rested on the incorrect premise that the Fourth Amendment permits a warrantless search of an individual whenever an officer chooses to arrest him, even if state law forbids the officer from conducting an arrest for that particular offense. *Id.* at 7. The court explained that the Fourth Amendment generally prohibits warrantless searches, subject to limited exceptions that include "a search incident to arrest exception * * * which allows a full field-type search of the person incident to a lawful custodial arrest." *Id.* at 5. The court stressed, however, that this exception does not extend to every case in which officers have probable cause to believe that an individual has violated the law. To the contrary, this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998), established "that the Fourth Amendment forbids expansion of the search incident to arrest exception to include a search incident to citation." Pet. App. 6.

3. This Court subsequently granted certiorari. 128 S. Ct. 28 (2007).

SUMMARY OF ARGUMENT

This Court has squarely held that an arrest for a state law offense and attendant search are unconstitutional when forbidden by state law. The

Fourth Amendment permits a search incident only to a "lawful arrest." *E.g.*, *United States v. Robinson*, 414 U.S. 218, 224 (1973). In *Johnson v. United States*, this Court applied that rule in holding that an arrest in violation of Washington law also violated the Fourth Amendment because "[s]tate law determines the validity of arrests without warrant." 333 U.S. 10, 15 n.5 (1948). The Court subsequently sustained the arrest in *Michigan v. DeFillippo* only because it comported with Michigan arrest law, reasoning that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." 443 U.S. 31, 36 (1979).

Those precedents reflect the principle that the Fourth Amendment's prohibition on "unreasonable" searches and seizures requires balancing the individual and governmental interests implicated by the police practice in question. Under that well-settled standard, petitioner loses. Officers here arrested respondent for a misdemeanor offense that is nonarrestable. The arrest and subsequent search were significant intrusions on respondent's liberty and privacy that were subject to the protections of the Fourth Amendment. On the other side of the balance, however, Virginia's prohibition on arrest embodies the State's determination that taking an individual into custody for such conduct does not further any governmental interest. To the contrary, the arrest squanders scarce police resources and is wholly unnecessary to ensure that the subject is held to account for the offense. The arrest was accordingly unreasonable.

The role of state law in this case is thus not to deem an otherwise constitutional arrest violative of the Fourth Amendment. Virginia's arrest law does not

trump the United States Constitution. Rather, to conduct a seizure or search under the Fourth Amendment, the government must have a good reason. Here it has none. The assessment of governmental interests in the Fourth Amendment balancing inquiry properly accounts for the legislature's determination that this intrusion on individual liberty is in fact *contrary* to the government's own interests. Because Virginia has, through its legislature, expressly disavowed any assertion that it has an interest in taking an individual into custody for this offense, the arrest is necessarily unreasonable.

An example illustrates the point. Assume hypothetically that, during the traffic stop of respondent, the officers had seen crack cocaine in plain view. Consistent with the Fourth Amendment, they then could have seized the drugs and placed respondent under arrest because drug offenses are arrestable. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). Virginia's prohibition on misdemeanor arrests would be irrelevant in that circumstance. In this case, by contrast, petitioner defends the arrest *only* on the ground that Virginia makes it a crime to drive with a suspended license. But because that conduct is nonarrestable under Virginia law, no justification exists under the Fourth Amendment that made it "reasonable" to take respondent into custody.

The statutes relevant to the Fourth Amendment reasonableness determination are thus the narrow but critical group of provisions that determine whether conduct is arrestable *vel non*. Petitioner cites a variety of other restrictions on the process of conducting an arrest, such as rules regarding whether officers must be in uniform and whether arresting officers must be

within their own jurisdictions. But the Solicitor General correctly acknowledges that provisions such as those were "enacted for reasons other than the protection of Fourth Amendment interests" (Br. 6), and this Court has held that such "trivialities" do not implicate the Fourth Amendment reasonableness determination. *Whren v. United States*, 517 U.S. 806, 815 (1996). By contrast, the fundamental legislative judgment that conduct is nonarrestable because an arrest furthers no governmental interest is centrally relevant to the determination of constitutional reasonableness.

Petitioner asserts that legislative determinations – and state legislative determinations in particular – are irrelevant under the Fourth Amendment. *Johnson* and *DeFillippo* hold precisely the contrary. Petitioner's argument also cannot be reconciled with many other cases. Nore does it make sense: an arrest for a state law offense plainly violates the Fourth Amendment if the State actually defines that conduct as legal. In that scenario, the arrest is unreasonable because it is unjustified. The same is true here – there is no justification for the seizure and incident search of respondent.

Petitioner's remaining argument is that it is sufficient that officers had "probable cause" to believe that respondent had committed an offense under state law. But this Court has repeatedly rejected the argument that probable cause is a license to conduct any "search" or "seizure" that officers please. *E.g.*, *Knowles v. Iowa*, 525 U.S. 113 (1998) (probable cause does not justify search of individual's person); *Payton v. New York*, 445 U.S. 573 (1980) (probable cause does not justify entry into the home to conduct arrest). Under

the bedrock Fourth Amendment balancing inquiry, the police practice in question must be tailored to further the asserted governmental interest – here, enforcing the prohibition on driving with a suspended license. Probable cause to believe respondent had committed that offense did justify the initial traffic stop because officers were entitled to issue him a ticket. But the further arrest and incident search violated the Fourth Amendment because they did not further any legitimate governmental purpose.

The judgment should accordingly be affirmed.

ARGUMENT

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment (*see Mapp v. Ohio*, 367 U.S. 643, 655 (1961)) provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. In this case, officers subjected respondent to a prototypical "seizure" and "search," which accordingly can be sustained as constitutional only if "reasonable." The Virginia Supreme Court's unanimous holding that the officers' conduct was unreasonable under the Fourth Amendment because they arrested respondent for a state law offense that the State classifies as nonarrestable comports with this Court's precedents. No state interest justifies arresting someone for

conduct that the state already has already determined does not justify imposing on a person's liberty and privacy in that manner.

I. An Arrest For An Offense That State Law Deems Nonarrestable Is Unreasonable Because It Furthers No Substantial Governmental Interest.

A. An Arrest And Search Constitute Significant Intrusions On Individual Liberty That Are "Reasonable" Under The Fourth Amendment Only If Justified By A Significant Governmental Interest.

As the text of the Fourth Amendment specifies, the "touchstone" of constitutionality is "the reasonableness in all the circumstances" of the law enforcement practice at issue. *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (citations omitted). The reasonableness inquiry balances "on the one hand, the degree to which [a seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (internal citations omitted); *see, e.g., Delaware v. Prouse*, 440 U.S. 648, 654 (1979). More specifically, "in judging reasonableness," this Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

Take traffic stops as an example. "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendment[]." *Prouse*, 440 U.S. at 653. But when officers "have probable cause to believe that a traffic violation has occurred," a traffic stop is "reasonable"; the officers' obvious interest in stopping the individual in order to issue a ticket outweighs the imposition that results from the brief seizure. *Whren v. United States*, 517 U.S. 806, 810 (1996).

The officers in this case had probable cause to believe that respondent had committed a misdemeanor offense. It was therefore reasonable for them to stop his vehicle and issue him a ticket. If respondent had then been ticketed and allowed to go on his way, no Fourth Amendment problem would have arisen.

But the officers instead placed respondent in custody. An arrest "is a *wholly different* kind of intrusion upon individual freedom" from a limited traffic stop (*Terry v. Ohio*, 392 U.S. 1, 26 (1968) (emphasis added)):

- "[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984); *see also Prouse*, 440 U.S. at 653 ("the purpose of the stop is limited and the resulting detention quite brief"). By contrast, during a custodial arrest, the subject is placed completely within the government's control for a significant period of time, potentially indefinitely.

- A traffic stop does not authorize a search of the individual or his vehicle. *Knowles v. Iowa*, 525 U.S.

113 (1998). By contrast, as this case well illustrates, an arrest is almost invariably combined with another intrusion on the individual's privacy in the form of a search incident to arrest of his person and surroundings. *See United States v. Robinson*, 414 U.S. 218, 224 (1973) (person); *Chimel v. California*, 395 U.S. 752, 763 (1969) (surroundings).

- "[C]ircumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of police," in part because a stop "is public, at least to some degree." *Berkemer*, 468 U.S. at 438. By contrast, in a custodial arrest, the individual, already in handcuffs, will often be placed in the rear of a police car and transported to a jail. He may be cut off from all contact with his family and friends, with the exception of a single telephone call. A judicial officer might not review the decision to detain the individual for as long as two days. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

- Finally, "questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." *Berkemer*, 468 U.S. at 437-38.

When, as in this case, the severity of an intrusion on liberty or privacy escalates beyond a mere brief stop to a full arrest, the balancing required by the Fourth Amendment "reasonableness" inquiry necessarily requires an equivalently enhanced governmental interest to justify that significant intrusion on individual liberty and privacy. It is not enough that the initial stop was justified. This Court has firmly rejected the proposition that "simply because some

interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed." *Chimel*, 395 U.S. at 767 n.12. The constitutionality of a seizure instead depends on whether the *particular police practice* in question – here, the arrest – is tailored to the asserted governmental interest. "The scope of [a] detention must be *carefully tailored* to its underlying justification" (*Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (emphasis added)), and an intrusion that "is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope" (*Terry*, 392 U.S. at 18).

B. A Legislative Determination That Conduct Is Not Arrestable Embodies A Definitive Judgment That The Government's Interests Are Not Furthered By Custodial Detention.

1. In this case, the question under the Fourth Amendment "reasonableness" inquiry is whether an objective justification for the arrest existed. The justification cited by petitioner is the fact that respondent was driving with a suspended license in violation of Virginia law. As noted, under this Court's precedents, that offense rendered the *initial* stop of respondent reasonable so that the officer could issue the required citation.

The Virginia Legislature has provided, however, that a misdemeanor offender may only be ticketed and then must be allowed to go on his way. Va. Code § 19.2-74. Virginia's prohibition on arrest specifically embodies a determination that, for misdemeanor offenses, the individual's significant interest in remaining free from custodial detention generally is not

outweighed by the government's interest in arrest. The United States Department of Justice commissioned a study by the American Bar Association which examined this balancing of interests. *See* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, COST ANALYSIS OF CORRECTIONAL STANDARDS: ALTERNATIVES TO ARREST (1975). The Report concluded that "use of citation and summons in lieu of arrest is critical" for minor offenses because it "assur[es] the liberty of an accused prior to his or her first court appearance," and accordingly "is a far less drastic means of guaranteeing that appearance than are traditional arrest and detention." *Id.* at 3. The Report proposed that "individual jurisdictions" would identify "eligible offenses" for which "citations would substitute for much of the traditional field arrest activity." *Id.* "From this perspective, citation release may be viewed as a logical extension of the basic constitutional precept of 'innocent until found guilty.'" DEBRA WHITCOMB ET AL., CITATION RELEASE 20 (Washington, D.C., National Institute of Justice, 1984). A strict rule requiring issuance of a ticket rather than an arrest furthers other significant governmental interests as well. As another U.S. Department of Justice Report on the practice recognizes, Virginia's approach of requiring citation release for certain offenses "offers the greatest potential for benefits both to the defendant and the criminal justice system: Patrol officers are removed from service for only a brief period of time, typically thirty minutes or less; no transportation costs are incurred; [and] defendants are subject to the least amount of disruption." *Id.* at vii.

Of course, where the crime is sufficiently serious, the governmental interest in detention and public safety outweighs those costs. "[N]o state mandates

citation for *any* felony." *Id.* at 24 (emphasis in original). But many States have determined, within their expert judgment, that jaywalkers are different from murderers and that, for minor crimes, immediate custody is not required and does not serve any governmental interest in protecting community safety, deterring crime, or efficiently prosecuting criminal activity. There is "a trend toward mandatory use of field citations for all misdemeanor offenses (except if certain conditions are present)." *Id.* at 3 (footnote omitted). "As of 1981, all but nine states had adopted statutes or rules of criminal procedure which authorize the use of citation release for certain criminal offenses." *Id.* at 3. The practice is not a novelty but instead "an outgrowth of procedures for responding to traffic law violations." *Id.* at 1.

The judgments underlying these statutory enactments parallel those reached by the most respected organizations in the field. Citation release has been "endorsed by a number of national police and criminal justice standard setting organizations." *Id.* at 2. "The procedure has gained the *unanimous* support of several national commissions and standard setting groups." *Id.* at 8 (emphasis added). Three sets of uniform laws have endorsed the use of citation release. *See* INTERSTATE COMMISSION ON CRIME, UNIFORM ARREST ACT (1941); AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.2 (1975); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 211, 221 (1974). The formative 1974 *Corrections* Report by the National Advisory Commission on Criminal Standards and Goals of the U.S. Department of Justice's Law Enforcement Assistance Administration similarly recommended that "[e]ach

criminal justice jurisdiction, state or local as appropriate, should immediately develop a policy," providing for "[e]numeration of minor offenses for which a police officer should be required to issue a citation in lieu of making an arrest or detaining the accused," absent specified exceptional circumstances. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS std. 4.3 (1973).

2. The Fourth Amendment properly accounts for these legislative determinations that an arrest does not further governmental interests. In the case of a state law offense, the function of the Fourth Amendment is not to divine governmental purposes that the government itself denies, but to take the State's asserted interests as it finds them and balance them under a federal constitutional standard against the individual's interests in privacy and liberty. Because the justification for placing respondent in custody for driving with a suspended license is lacking – and petitioner points to no other – the arrest of respondent was unconstitutional.

The Fourth Amendment, as incorporated through the Fourteenth Amendment, thus *constrains* the authority of governmental officials to conduct searches and seizures; it does not *create* such authority in the first instance. Under the Constitution's scheme of separated federal and state powers, the States are the primary architects of criminal law and law enforcement procedures. When a law duly enacted by the legislature and signed into law by the executive formally and expressly withholds the authority to arrest for an offense – thereby specifically disavowing any important governmental interest in depriving individuals of their liberty for the offense – nothing in

the Fourth Amendment displaces or trumps that judgment. States are well aware of the cost that an arrest inflicts not only on individual liberty, but also on the time and resources of law enforcement officials, who must divert themselves from other policing efforts to perform the time-consuming process of transporting, booking, and otherwise processing an arrestee. *Cf. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (noting that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions") (internal quotation marks omitted).

For state officers pursuing state offenses, the authority to make arrests and to undertake searches is granted by state law. The elected branches of state government determine whether and when a sufficient governmental interest exists to invest state officers with the authority to effect arrests and searches. By the same token, state law can define when arrests or searches cannot be made by these officers. The positive authority of state police officers to exercise law enforcement authority thus is purely a product of state law. The Fourth Amendment no more supplements an officer's authority to arrest than it could create such policing authority in the first instance. Indeed, petitioner accepts (Br. 16-17) that the Fourth Amendment forbids an arrest for conduct that is lawful and does not implicate officers' community caretaking function. In the absence of criminality or an alternatively compelling justification (such as dangerousness to self or others), such an arrest is necessarily "unreasonable" because it lacks any reasonable justification.

In this respect, respondent's rule would continue the Fourth Amendment's long tradition of respect for and consideration of state judgments by permitting state legislatures to experiment with differential arrest schemes based on the resources, needs, and concerns of their individual jurisdictions. This Court's Fourth Amendment precedents are appropriately deferential to the judgments of the States, "recogniz[ing] the desirability of flexibility and experimentation." *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975); *see also County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (acknowledging the importance of allowing jurisdictions to be flexible in developing their criminal procedures); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (giving weight to the state law determination of "the gravity of the underlying offense for which the arrest is being made").

Of course, the required justifications for an arrest are not static or provided only by state law. For example, even when state law forbids an arrest for the particular conduct for which an officer subjectively makes a stop, a different ground for the arrest may exist. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (the "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"). In addition, during the initial stop, new justifications for a search or a more intrusive seizure may arise. Evidence seen in "plain view" during the stop may justify charging the driver with a federal or state crime (*see Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971)), and the law defining that newly identified criminal activity – *e.g.*, a drug offense – may itself authorize an arrest. *See, e.g., Adams v. Williams*, 407 U.S. 143, 148 (1972) (only after the arresting officer found a gun during a *Terry* stop and

frisk did "probable cause exist[] to arrest Williams for unlawful possession of the weapon"). The critical point remains, however, that the reasonableness inquiry requires a justification for placing an individual into custodial detention and subjecting him to a search, and when the *only* asserted justification is the offense underlying the initial stop (as in this case), the arrest is unreasonable if the legislature has forbidden it.

3. The conclusion that the Fourth Amendment reasonableness inquiry respects state legislative judgments also follows from the practice at the time of the Constitution's framing. This Court recounted that history in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), concluding that it was a significant guide to the determination whether an arrest is "reasonable." *Id.* at 326-27. *Atwater* specifically considered the constitutionality of a warrantless arrest, authorized by state law, for a nonviolent misdemeanor (driving without a seatbelt). This Court rejected the argument that the common law categorically "forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace." *Id.* at 340.

Critically, *Atwater* reasoned that, at the time of the framing, the reasonableness of an arrest instead depended on *legislative* determination, both in England and in the colonies. Most relevant here, this Court in *Atwater* relied heavily on the fact that, in the era of the founding, legislatures had conferred authority to arrest for such offenses. *Id.* at 328 ("[I]n the years leading up to American independence, Parliament repeatedly extended express warrantless arrest authority to cover misdemeanor-level offenses not amounting to or involving any violent breach of the peace."); *id.* at 337

("colonial and state legislatures, like Parliament before them * * * regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace"); *id.* at 342 (citing "numerous early- and mid-19th-century decisions expressly sustaining (often against constitutional challenge) state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace"); *accord* Pet. Br. 1 (variation in state arrest law has existed "[f]rom the ratification of our Constitution").[2] That history squarely supports respondent's position that the reasonableness of an arrest for an offense depends on the predicate of legislative authorization.[3]

Noteworthy in this respect are the class of so-called "summary convictions," for which legislatures forbade arrest outright. *See* W. PALEY, THE LAW AND

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[2] Congress, in turn, did not authorize arrest for all offenses but instead more narrowly granted federal law enforcement officers "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." Act of May 2, 1792, c. 28, § 9, 1 Stat. 265. *See generally United States v. Watson*, 423 U.S. 411, 420 (1976). Congress subsequently supplemented that statutory authority by granting federal officers uniform authority to arrest for any felony, and misdemeanors committed in their presence. 18 U.S.C. § 3053.

[3] In this case, petitioner makes essentially the reverse of the claim considered in *Atwater* – it argues that the Fourth Amendment *permits* every warrantless misdemeanor arrest, notwithstanding that Virginia forbids an arrest for driving with a suspended license. Br. 12-13. As discussed in the text, that assertion cannot be reconciled with *Atwater*'s recitation of the common-law-era history.

PRACTICE OF SUMMARY CONVICTIONS 228 (V. B. Bateson ed., 9th ed. 1926) (1814) ("for misdemeanors arising under penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognizance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but could only summon him to attend, and in default of his appearance proceed ex parte."). Parliament created the summary conviction offenses and also established the procedure for prosecuting offenders. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV L. REV. 917, 926 (1926). Colonial governments in the United States used such statutes as well. *See* J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 415-19 (1944).[4]

4. Rather than acknowledging the above points, petitioner argues (Br. 23) that States should determine the appropriate remedies for violations of their own laws. So they should, and nothing in the Virginia Supreme Court's decision precludes the use of tort law or police disciplinary proceedings to respond to abuses of the arrest power. The question in this case is not whether States may sanction their own employees, but whether official state determinations that use of the arrest power is unnecessary and unwarranted bear on

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[4] While the number of prosecutions by summary conviction is unknown, it was likely significant, as Blackstone devoted an entire chapter of the fourth volume of his *Commentaries on the Laws of England* to discussing summary convictions, and complained about the backlog of work that they created for magistrates. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 277, 279 (1769).

the Fourth Amendment's "constitutional reasonableness" inquiry. Giving effect and force to such state legislative judgments does not encroach on state remedial powers. Quite the opposite, a rule of federal constitutional law that state legislative judgments can be ignored – and thus that renegade police officers can reward their own misconduct – will make it harder for States to rein in, regulate, and punish the actions of their own officers.

C. Holding That Arrests For Nonarrestable Offenses Nonetheless Are Constitutional Would Contradict The Purpose Of The Fourth Amendment To Prevent Unwarranted And Unjustified Intrusions On Individual Liberty And Privacy.

The significant consequences of overriding these legislative judgments by deeming all infractions arrestable are palpable. This Court's Fourth Amendment precedents establish that the best way to ensure that an arrest is not a pretext for an unconstitutional search is to require that the arrest rest on an objective basis. *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996). A categorical prohibition on arrest, such as the one Virginia has adopted, establishes that there is no objective basis for such a seizure. The statute thereby effectuates an "essential purpose" of the Fourth Amendment's proscriptions – "to impose a standard of 'reasonableness' upon the exercise of discretion" by law enforcement "in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)

(footnote and some internal quotation marks omitted); *see Illinois v. Rodriguez*, 497 U.S. 177, 186 n.* (1990).

The record in this case illustrates the potential for abuse of the search power under petitioner's contrary rule. After arresting respondent, the officers did not take him to a police station for booking. Instead, forty-five minutes after the arrest, they drove to respondent's hotel room and searched him and the premises. Pet. App. 2, 36. When asked why they did not release respondent with a summons as required by state law, an officer asserted that it was "[j]ust our prerogative" and that "we were also conducting a narcotics investigation." J.A. 15. Indeed, the officer's only justification for the arrest was that "narcotics were eventually recovered." *Id.* But "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63 (1968).

The Virginia Supreme Court correctly perceived that a contrary holding that police may arrest in contravention of state law would render this Court's unanimous decision in *Knowles v. Iowa* a dead letter for Fourth Amendment purposes. *Knowles* held that officers may not search an individual on the basis of a citation. 525 U.S. 113, 114 (1998). On petitioner's view, officers can easily evade *Knowles* because they will have a categorical right under the Constitution to conduct a custodial arrest in every case in which they may issue a citation, no matter how trivial the offense, and notwithstanding the absence of any lawful authority to do so.

If petitioner's position is accepted, opportunities for custodial arrest will be almost limitless. Virginia has defined many forms of conduct as nominal but

nonarrestable misdemeanors, from moral offenses (public spitting (Va. Code § 18.2-322) and public cursing (§ 18.2-388)) to minor offenses involving animals (failing to provide "companion animals" with "[a]dequate exercise" (§ 3.1-796.68(A)(5)); violating a local dog leash ordinance (§ 3.1-796.128(A)(3)); and harboring an unlicensed cat (§ 3.1-796.128(A)(7))), to the truly esoteric (buying a milk crate belonging to a third party without consent (§ 18.2-102.2(1)); opening and leaving open another person's gate (§ 18.2-143); and scaring poultry with a spotlight (§ 18.2-509)).

Indeed, petitioner's position that the Fourth Amendment permits an arrest for any crime (Br. 16-17) knows no outer bound. Beyond the minor offenses just noted, there is no principled basis under petitioner's theory to differentiate numerous common regulatory offenses – such as parking violations – as nonarrestable under the Fourth Amendment. The common law recognized public wrongs enforceable by the criminal law and private civil wrongs enforceable through civil actions. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1769). Modern law, however, recognizes a third class of illegality – known as "infractions," "violations," or "petty offenses" (*see* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 1.04 cmt. (1985)) – that is effectively quasi-criminal. Virginia, for example, does not distinguish between non-criminal infractions and minor misdemeanors for arrest purposes. "Traffic infractions are violations of public order * * * and not deemed to be criminal in nature." Va. Code § 18.2-8. But "[f]or purposes of *arrest*, traffic infractions shall be treated as misdemeanors. * * * [T]he authority and duties of arresting officers shall be *the same* for traffic

infractions as for misdemeanors." *Id.* § 46.2-937 (emphases added).

The State has also authorized local governmental entities to enact their own regulatory schemes. For example, "[t]he governing bodies of counties, cities, and towns may enact ordinances requiring pedestrians to obey signs and signals erected on highways therein for the direction and control of traffic, [and] to obey the orders of law-enforcement officers engaged in directing traffic on such highways." *Id.* § 46.2-935; *see, e.g.*, Code of Alexandria, Va. § 10-5-4 ("[p]edestrians shall obey signs and signals erected on the streets" under penalty of fine "not more than five dollars"). These offenses may carry "penalties not exceeding those of a traffic infraction." Va. Code § 46.2-935; *see also id.* § 46.2-941 ("violation of an ordinance of any county, city, or town regulating parking" is subject to a summons if the violator does not pay the parking fine); *id.* § 15.2-901 (violation of local trash ordinance may be punishable as misdemeanor). If the Virginia Supreme Court's decision is reversed, all of these local offenses will presumably permit an arrest under the Fourth Amendment, notwithstanding the express legislative judgment that they should carry no consequence beyond that associated with a misdemeanor.[5]

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[5] To be sure, this Court held in *Atwater* that the Fourth Amendment permitted a warrantless arrest for a nonviolent misdemeanor *that was authorized by state law*. 532 U.S. at 323. Petitioner's position would dramatically expand the sweep of the Fourth Amendment arrest authority to the many offenses for which arrest is forbidden. Before trivial and anachronistic misdemeanor offenses that are committed by almost every American – for example, minor speeding infractions – trigger the

D. This Court's Precedents Establish That An Arrest And Search Violate The Fourth Amendment If Prohibited By State Law.

Petitioner's argument not only misconceives the purpose and role of legislative judgments under the Fourth Amendment, but also is directly contrary to this Court's precedents, which have required that arrests for state law offenses be permissible under state law as a precondition to their constitutional reasonableness under the Fourth Amendment.

In *Johnson v. United States*, 333 U.S. 10 (1948), police officers in Washington State entered a hotel room after smelling opium, arrested the occupant, and then found drugs in a search of the premises. *Id.* at 12. This Court first held that the initial entry violated the Fourth Amendment because the intrusion into the private living space required a warrant (*id.* at 15) and was non-consensual (*id.* at 13). With respect to the argument that the search should nonetheless be upheld as "valid because incident to an arrest" (*id.* at 15), the Court explained that the "determin[ation] whether the arrest itself was lawful" (*id.*), would turn on the governing "Washington law" (*id.* at 15 n.5). More specifically, the Court held that "[s]tate law determines the validity of arrests without warrant." *Id.* Because the warrantless arrest was not permitted as a matter of Washington law (*id.* at 15-16), this Court held that the evidence must be suppressed under the Fourth Amendment. *Id.*

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power to arrest and search, legislatures must make that judgment, for which they can be held accountable by the electorate.

The Court again held that the Fourth Amendment permits the seizure of evidence incident to an arrest only if the arrest itself was authorized by state law in *Michigan v. DeFillippo*, 443 U.S. 31 (1979). In that case, officers used their state law arrest power to take the defendant into custody for violating a local criminal ordinance requiring any person to identify himself at the request of police. The officers found drugs in a search incident to the arrest. The defendant successfully argued in the lower courts that the identification ordinance was unconstitutional. *Id.* at 34-35. This Court nevertheless held that the evidence was not seized in violation of the Fourth Amendment, reasoning that the *arrest* was independently constitutional because it was authorized by state law. *Id.* at 37, 40. The Court stressed that "[t]he fact of a *lawful* arrest, standing alone, authorizes a search" (*id.* at 35) and, following *Johnson*, held that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law" (*id.* at 36 (citing *Johnson*, *supra*)). Because it was uncontested that the arrest of the defendant was "authorized by Michigan law" through its general arrest statute (*id.*), and because the officer "had abundant probable cause to believe that respondent's conduct violated the terms of the ordinance," the Court held that the arrest and attendant search did not violate the Fourth Amendment:

> Once respondent refused to identify himself as the presumptively valid ordinance required, the officer had probable cause to believe respondent was committing an offense in his presence, and Michigan's general arrest statute, Mich. Comp. Laws. § 764.15 (1970), authorized the arrest of respondent,

> independent of the ordinance. The search which followed was valid because it was incidental to that arrest. The ordinance is relevant to the validity of the arrest and search only as it pertains to the "facts and circumstances" we hold constituted probable cause for arrest. The subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed.

Id. at 39-40.

Johnson and *DeFillippo* are consistent with this Court's broader Fourth Amendment jurisprudence, which confirms that the requirement of a state law predicate to arrest for state offenses is deeply ingrained into the determination of "reasonableness." For example, the Court held in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), that police may enter a home on the basis of exigent circumstances only if state law deems the offense sufficiently serious. The Court reasoned, "The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. * * * *Given this expression of the State's interest*, a warrantless home arrest cannot be upheld simply because" evidence of the offense might otherwise dissipate. *Id.* at 754 (emphasis added).

Still other decisions of this Court look to state law as a means of ensuring that police do not act arbitrarily in conducting searches and seizures that do not rest on probable cause. In cases involving inventory searches,

traffic checkpoints, and administrative warrants, the Court's Fourth Amendment analysis has relied on external legal rules such as state law to ensure evenhandedness by the police. *See South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (inventory searches); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (same); *Cooper v. California*, 386 U.S. 58, 60-61 (1967) (same); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453-55 (1990) (traffic checkpoint); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976) (same); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (administrative warrant for housing inspections); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978) (administrative warrant for business inspections). As the Solicitor General concedes, in such cases, "the Court has looked to the existence of state policies in determining that the actions are *reasonable* under the Fourth Amendment." Br. 12 n.3 (emphasis added). As discussed above, giving Fourth Amendment effect to the State's judgment that arrests are not necessary similarly promotes the evenhanded administration of the law.[6]

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[6] Respondent's position no more constitutionalizes state law than do the decisions of this Court considering governmental purposes advanced by the State in balancing tests required by other constitutional provisions. Giving effect under the Fourth and Fourteenth Amendments to the State's legislative judgment that arrests are an unwarranted and unnecessary intrusion on individual liberty parallels this Court's repeated decisions holding that state laws can create liberty interests protected by the Fourteenth Amendment's Due Process Clause – which is the source of respondent's Fourth Amendment protections against state officers. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221-22 (2005); *Bd. of Pardons v. Allen*, 482 U.S. 369, 370, 381 (1987); *Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974).

E. The Search Incident To Arrest Was In Any Event Unconstitutional Because It Was Contrary To Law.

The foregoing establishes that respondent's arrest violated the Fourth Amendment. It follows that the incident search of his person was tainted by that illegality and hence unconstitutional. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). It is therefore not necessary to decide whether the fact that the arrest violated state law independently renders the search unconstitutional without regard to the arrest. But to the extent the Court elects to reach the question, the search itself violated the Fourth Amendment.

The search incident to arrest doctrine is a special exception to this Court's general requirement that a warrant accompany a search. *Robinson*, 414 U.S. at 224. This Court has never held that the doctrine permits a search regardless of the officer's legal authority to effect the underlying arrest. To the contrary, in *Robinson*, this Court took care to state nine times that its holding applied only to searches incident to a "lawful" arrest. *E.g.*, *id.* at 224 ("It is well settled that a search incident to a *lawful* arrest is a traditional exception to the warrant requirement of the Fourth Amendment.") (emphasis added).[7] This Court's decisions in *Johnson* and *DeFillippo*, *supra*, make clear

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[7] This careful language reflects the long-established constitutional understanding of the search incident to arrest exception. *See, e.g.*, *Preston v. United States*, 376 U.S. 364, 367 (1964); *United States v. Di Re*, 332 U.S. 581, 587 (1948); *Harris v. United States*, 331 U.S. 145, 150 (1947); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914).

that by "lawful" arrests, the *Robinson* Court was referring to *authorized* arrests, and not merely to arrests supported by probable cause to believe that an offense had occurred.[8]

Limiting the search incident to arrest exception to cases of authorized arrests is also consistent with the common law tradition that gave rise both to the exception and to its limitation to "lawful arrests." *See Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The common law did not permit searches incident to arrests for offenses not subject to arrest under local law. In an opinion relied upon by this Court in *Robinson*, 414 U.S. at 232, then-Judge Cardozo explained this "basic principle" as follows: "Search of a person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds yet unknown for arrest or accusation." *New York v. Chiagles*, 237 N.Y. 193, 197 (1923) (citing *Entrick v. Carrington*, 19 Howell's State Trials 1030). At common law, an officer's unauthorized or unjustified arrest of a citizen constituted a trespass (*see Payton v. New York*, 445 U.S. 573, 592 (1980)), rendering any subsequent search unlawful as well. *See New York v. DeFore*, 150 N.E. 585, 586 (N.Y. 1926) (holding that "[t]he search was unreasonable in the light of common law traditions" because the underlying arrest was not

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[8] Both *Johnson* and *DeFillippo* separately considered and found critical to their Fourth Amendment holdings the question whether the arrest was "lawful" under state law. *Johnson*, 333 U.S. at 15; *DeFillippo*, 443 U.S. at 35. "Lawful arrest," moreover, is a term of art regularly used to incorporate both state and federal requirements that might give rise to a claim for wrongful arrest. *Heck v. Humphrey*, 512 U.S. 477, 486 n.6 (1994).

authorized by state law, and thus "[t]here was no lawful arrest to which the search could be an incident").

Finally, invalidating the incident search in this case is consistent with the principle that "manufactured exigencies" do not justify intrusions under the Fourth Amendment. Although this Court has not confronted the question, the courts of appeals have recognized that, although exigent circumstances may justify an arrest or search, they "do not meet Fourth Amendment standards if the government deliberately creates [them]." *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006) (citing cases). An officer's subjective intent to avoid the warrant requirement by creating exigencies is sufficient to invoke this rule, but it is not necessary; even in the absence of bad faith, exigent circumstances cannot justify a search if they were created by "tactics or procedures" that were "unreasonable or contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions)." *United States v. Gould*, 364 F.3d 578, 591 (5th Cir. 2004). This prohibition on manufactured exigencies sensibly denies officers the power to circumvent the Fourth Amendment by creating circumstances that might justify a warrantless search. When, as here, the underlying arrest violated state law, an officer should not be permitted to rely upon that arrest to justify an incident search, any more than the officer can rely on equally unreasonable conduct to establish exigent circumstances in other contexts.

II. Petitioner's Arguments For Reversal Lack Merit.

A. Mere Probable Cause To Believe An Offense Has Occurred Does Not Render A Custodial Arrest Reasonable Under The Fourth Amendment.

The crux of petitioner's argument for reversal is that "probable cause" categorically justifies any arrest, no matter whether it furthers any governmental interest. Petitioner's position is in essence that the "probable cause" standard supplants the balancing inquiry set forth in this Court's Fourth Amendment jurisprudence. Br. 14-17. But this Court has never so held. Nor does that argument make logical sense. "Probable cause" does not supplant the prohibition on "unreasonable" searches and seizures. The Constitution presents those dual requirements in the disjunctive: The protection against "unreasonable searches and seizures" is distinct from the requirement that "no Warrants shall issue but upon probable cause." U.S. CONST. amend. IV. Petitioner fails to offer any reasoned explanation – indeed, anything beyond *ipse dixit* – for the view that it is "reasonable" to arrest any individual for any trivial offense, even when the legislature has concretely determined that the arrest not only would be an excessive intrusion on individual liberty and privacy, but also would be directly contrary to the government's own interests as it unnecessarily squanders scarce police resources. Put another way, "probable cause" to believe an offense has occurred is not the same thing as "probable cause" *to arrest*. The latter exists only if there is a sufficient governmental interest to justify the intrusion of custodial detention.

At bottom, petitioner's position that an arrest requires only "probable cause" amounts to the proposition that the arrest is constitutional notwithstanding that it is – under the Fourth Amendment balancing inquiry – "*unreasonable*." This is a case in which the government candidly does not contest that the balancing of individual and governmental interests overwhelmingly favors the individual. But the bedrock principle that the Fourth Amendment permits only "reasonable" seizures – such that an arrest requires a substantially greater justification than a mere traffic stop – demonstrates that petitioner errs in asserting that "probable cause" categorically justifies an arrest under the Fourth Amendment.

It is in fact settled that "probable cause" to believe that an offense has occurred justifies only certain intrusions upon liberty and not others. Thus, the Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), that officers with probable cause to arrest ordinarily may not use deadly force to effectuate that arrest. *Garner* establishes that "the 'reasonableness' of a particular seizure depends not only on *when* it is made" – *i.e.*, upon probable cause to believe an offense has occurred – "but also on *how* it is carried out." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphases in original). Likewise, probable cause to arrest for an offense does not justify the further intrusion of an entry into the home. *Payton v. New York*, 445 U.S. 573, 587-89 (1980).

Petitioner contends (Br. 10-13, 44) that a probable cause standard is sufficient because it limits the prospect that arrests will be arbitrary, such that the arrest in this case does not implicate the same concerns

as the "general warrants" that were a principal motivation for the adoption of the Fourth Amendment. In support of this proposition, petitioner (Br. 12) quotes this Court's statement in *Payton*, 445 U.S. at 583, that "indiscriminate searches and seizures under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."

As noted above, the Virginia statute in fact does reduce the prospect of arbitrary detentions by constraining officers' discretion in conducting arrests. But in any event, the Fourth Amendment is concerned with privacy and liberty more broadly, not merely with arbitrary detention. Petitioner thus tellingly omits *Payton*'s conclusion only a few lines later that it is "*perfectly clear* that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant." *Id.* at 585 (emphasis added). Indeed, this Court unanimously rejected an indistinguishable argument in *Knowles v. Iowa*, 525 U.S. 113 (1998). The stop in that case was based on probable cause, and hence the individual was not "arbitrarily" subjected to an intrusion on his liberty. Yet this Court held that officers could not search him without further justification. *Id.* at 118-19.

Petitioner relies on language in this Court's opinions indicating that an officer may arrest if he has probable cause to believe the suspect has committed an offense. Br. 14 & n.6, 17. But in *every* case petitioner quotes, the legislature had authorized an arrest for the offense in question. Thus, in *Atwater*, the Court noted at the outset of its opinion that "Texas law expressly authorizes '[a]ny peace officer [to] arrest without warrant a person found committing a violation' of th[e]

seatbelt laws [at issue]." 532 U.S. at 323 (quoting Tex. Transp. Code Ann. § 543.001 (1999)). Underscoring the point, the Court appended to its decision a list of statutes that render misdemeanor offenses arrestable. *Id.* at 355-60; *accord Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148, 1157 (D.C. Cir. 2004) (arrest for eating on train indistinguishable from arrest sustained in *Atwater* because "[a]s in this case, there was no dispute [in *Atwater*] that the plaintiff had violated the statute in the presence of the arresting officer and that state law authorized her arrest"); Pet. Br. 31 ("Given the background of state law in *Atwater*, the issue presented by [this case] was not present.").[9]

Further, none of the cases cited by petitioner considered the question presented here, even in dictum. It is in fact uncontested that the excerpts petitioner quotes were not intended to be taken as absolute statements of the full scope of the Fourth Amendment's requirements, regardless of context. The Solicitor General, for example, acknowledges that those excerpts do not describe the rule for arrests inside the home. Br. 7-8. The quoted statements also omit any requirement that a misdemeanor offense be committed in the

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[9] *See also Devenpeck v. Alford*, 543 U.S. 146 (2004) (arrest authorized by Wash. Rev. Code § 10.31.100 (1997)); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (noting arrest authority under Md. Ann. Code, Art. 27, § 594B (1996) (repealed 2001)); *Whren v. United States*, 517 U.S. 806 (1996) (arrest authorized by D.C. Code § 23-581(a)(1)(B) (1981 & 1989 Supp.)); *Michigan v. DeFillippo*, 443 U.S. 31, 33 n.1 (1979) (city ordinance made failure to identify oneself to an officer arrestable offense); *United States v. Robinson*, 414 U.S. 218 (1973) (D.C. Code Ann. § 40-302(d) (1967) authorized arrest); *United States v. Watson*, 423 U.S. 411, 415-17 (1976) (federal law authorized warrantless arrest for postal service violations).

officer's presence, yet *Atwater v. City of Lago Vista* expressly left open whether the Fourth Amendment imposes such a requirement. 532 U.S. 318, 340 n.11 (2001). The Court has also said just as often that only a "legal" arrest authorizes an arrest and incident search. *See* Part I.E, *supra*.

When one reviews this Court's actual holdings, as opposed to snippets of language in inapposite cases, this Court's decisions uniformly support respondent. None of the cases cited by petitioner states – much less holds – that state legislative determinations are irrelevant to the determination of an arrest's reasonableness. When the Court considered that issue in both *Johnson* and *DeFillippo*, it squarely rejected petitioner's position. *See* Part I.D, *supra*.

B. Giving Effect To The Legislature's Judgment That An Offense Is Nonarrestable Is Consistent With Constitutional Law And Federalism Principles.

1. Petitioner's Argument That Fourth Amendment Jurisprudence Precludes Accounting For State Legislative Judgments Gains Petitioner Nothing And In Any Event Is Directly Contrary To This Court's Decisions.

a. Incorporating into the Fourth Amendment's reasonableness inquiry the legislative judgment that no governmental interest would be advanced by an arrest would not, as petitioner contends (Br. 8, 9, 39), constitutionalize every violation of state law. Rather, the Virginia Supreme Court's holding stands for the

much more modest proposition that, when courts apply the Fourth Amendment's balancing of governmental and private interests affected by a seizure, they will consider and respect the State's official articulation of that governmental interest. *See* Part I, *supra*.

Petitioner's argument that respecting the legislative judgment that arrest is unnecessary would require the federalization of other procedural constraints on police authority (Br. 39-44) is wrong. The restrictions on the arrest authority that petitioner cites have nothing to do with the Fourth Amendment's long-established weighing of the public interest served by a custodial arrest, and would have no logical role in assessing the "constitutional reasonableness" of an arrest. Those measures do not inform the question whether officers have probable cause to arrest, as this Court has held that such "trivialities" are not relevant to the Fourth Amendment reasonableness inquiry. *Whren v. United States*, 517 U.S. 806, 815 (1996) *See, e.g.*, *Bovie v. Indiana*, 760 N.E.2d 1195, 1199 (Ind. Ct. App. 2002) (purpose of requirement that arresting officer be in uniform is "to protect drivers from police impersonators and to protect officers from resistance should they not be recognized as officers"); *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1145 (Mass. 1986) (defendant's right to have an opportunity to respond to a misdemeanor charge before process is issued "was designed to encourage informal resolution of private disputes and minor criminal matters"); *Michigan v. Hamilton*, 638 N.W.2d 92, 98 (Mich. 2002) (purpose of territorial limits on arrest powers is "to protect the rights and autonomy of local governments in the area of law enforcement") (internal quotation omitted); *accord* S.G. Br. 6 (restrictions of that sort

were "enacted for reasons other than the protection of Fourth Amendment interests"), 23.

Likewise, petitioner's list of cases (Br. 36-37 nn.26-28) involving compliance with such procedural and technical restrictions on the arrest authority do not speak to the government's foundational interest deeming conduct arrestestable, which is what concerns the Fourth Amendment. If anything, state laws and rules regulating *how* an arrest should be made underscore that there is a distinct public interest in making an arrest that the Fourth Amendment can weigh in its reasonableness calculus. Such laws confirm that arrest is expected and necessary; they do not disavow any need for custodial detention, as Virginia has done here.[10]

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[10] Some of petitioner's cases involve particular state law warrant requirements. *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998); *United States v. Walker*, 960 F.2d 409 (5th Cir. 1992). Others involve jurisdictional limits on the particular officer's arrest authority. *New Hampshire v. Smith*, 908 A.2d 786 (N.H. 2006); *Michigan v. Hamilton*, 638 N.W.2d 92; *Maine v. Jolin*, 639 A.2d 1062 (Me. 1994); *Colorado v. Hamilton*, 666 P.2d 152 (Colo. 1983). Several involve peculiar procedural requirements. *Gordon v. Degelmann*, 29 F.3d 295 (7th Cir. 1994) (failure to provide a hearing to defendant before removing him as a trespasser); *United States v. Wright*, 16 F.3d 1429 (6th Cir. 1994) (failure to meet state's heightened standard of suspicion for arrest based upon information of an informant); *Ohio v. Droste*, 697 N.E.2d 620 (Ohio 1998) (type of officer authorized to arrest); *Lyons*, 492 N.E.2d 1142 (failure to provide defendant notice to challenge misdemeanor complaint). A number involve no violation of state law at all. *Malone v. County of Suffolk*, 968 F.2d 1480 (2d Cir. 1992); *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989); *Anderson v. Haas*, 341 F.2d 497 (3d Cir. 1965). The only possible exception involves decisions holding that the Fourth Amendment is not violated by arrests that are contrary to state law, when that

The better-reasoned lower court authority agrees that the Fourth Amendment forbids placing an individual in custody for a nonarrestable offense. *See United States v. Mota*, 982 F.2d 1384, 1389 (9th Cir. 1993) ("Given the state's expression of disinterest in allowing warrantless arrests for mere infractions, we conclude that a custodial arrest for such an infraction is unreasonable, and thus unlawful, under the Fourth Amendment."). The Eighth Circuit is the only federal appellate court to reach the opposite conclusion, but judges of that court have harshly criticized that decision. *Compare United States v. Bell*, 54 F.3d 502 (8th Cir. 1995), *with United States v. Lewis*, 183 F.3d 791, 794-95 (8th Cir. 1999) (Heaney, J., concurring), *id.* at 796 (Goldberg, J., concurring), *and United States v. Pratt*, 355 F.3d 1119, 1123 n.3 (8th Cir. 2003) (panel questioning the correctness of *Bell*, especially "in light of the [Supreme] Court's dependence on state law in *Atwater*").

b. Petitioner nonetheless makes a broadside objection to *any* consideration of legislative judgments – and state legislative judgments, in particular – in the Fourth Amendment reasonableness determination. That argument is deeply flawed from the outset, because it cannot gain petitioner anything. There must be *some* means for determining whether an arrest is reasonable. Petitioner assumes that, if the legislative determination to authorize an arrest is not the correct

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state law permits arrests only for misdemeanors that occur in the officer's presence. *See, e.g., Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir. 1997). As noted in Part II.A, *supra*, this Court has not yet resolved the predicate question whether the Fourth Amendment itself incorporates a common law presence requirement, and in any event that question is not presented here.

measure of the government's interest, then the appropriate course would be to hold that the Fourth Amendment categorically authorizes every arrest for any offense, however trivial and whatever the circumstances. But such a rule would fly in the face of the reasonableness requirement itself, as it would eschew any assessment of whether the substantial intrusion on liberty and privacy that results from an arrest and search furthers a significant governmental interest.

To be sure, there are a few instances in which this Court has held that no case-by-case inquiry into the particular circumstances surrounding a search are required, instead adopting an "automatic" or "bright line" rule under which one Fourth Amendment intrusion authorizes another. Principally, an arrest *per se* authorizes an incident search. *See United States v. Robinson*, 414 U.S. 218, 235 (1973). But as this Court explained in refusing to extend that rule to other intrusions, the search incident to arrest power is "automatic" (*Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983)), only because *every* arrest distinctly furthers one or both of the government's interests in the search – officer safety and securing evidence of the crime. *See Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998) (Fourth Amendment forbids search incident to citation); *Long*, 463 U.S. at 1032 (Fourth Amendment forbids search incident to *Terry* stop).

Critically, petitioner does not even attempt to identify a governmental interest that justifies an equivalently "automatic" rule that the Fourth Amendment always permits an arrest upon probable cause, whatever the offense. Nor do any of petitioner's *amici*, including the Solicitor General. That silence is

telling, and its reason is obvious. There is no basis in experience, logic, or the law to say that any legitimate interest is served by a categorical rule that officers may arrest for minor transgressions. It cannot be presumed that the police have a need to take an individual into custody, search him and his car, take him in handcuffs to a police station, book him, and hold him for two days without review by a neutral magistrate for failing to use his turn signal, driving with a suspended license, or committing any of the innumerable other offenses that legislatures routinely make subject to a fine while mandating that only a ticket may be issued for such an infraction.[11]

Hence, if petitioner were right that state legislative judgments are irrelevant, the logical rule would instead be that the reasonableness of the arrest would depend on the specific circumstances of each case. The Court has adopted just such a context-specific assessment in a variety of analogous

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[11] Under the Fourth Amendment reasonableness inquiry, it is not enough that the Constitution recognizes the government's generalized interest in combating crime. Rather, the particular intrusion must be "appropriately tailored" to "advance[] this grave public concern to a significant degree." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). For example, in *City of Indianapolis v. Edmond*, this Court acknowledged the "severe and intractable nature of the drug problem" served by the narcotics checkpoints operated by the City of Indianapolis. 531 U.S. 32, 42 (2000). The Court nevertheless invalidated the checkpoint program because the means chosen to advance that important public purpose was not reasonably tailored to align the governmental purpose with the intrusion on liberty. As this Court explained, "the gravity of the threat alone cannot be dispositive of questions concerning what *means* law enforcement officers may employ to pursue a given purpose." *Id.* (emphasis added).

circumstances. Among many examples, officers conducting a permissible *Terry* stop may go further and conduct a patdown search only if they have a reasonable suspicion that the individual is armed. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). Officers conducting an arrest in a home pursuant to a warrant may conduct a further protective sweep of the premises only if they have reasonable suspicion that "the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334 (1990). And the force that officers may use in conducting an arrest depends on their assessment of the likelihood of a suspect's escape and probable cause to believe that the suspect presents a danger of "death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 1 (1985).

In this case, the appropriate context-specific rule would be that officers may conduct an arrest for a minor offense if they possess a reasonable belief that custodial detention is required. After extensive consultation, the American Bar Association has promulgated a Standard that identifies the circumstances in which the government has a genuine reason to take an individual into custody. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE std. 10-2.2 (3d ed. 2007). The Standards preclude an arrest for a minor offense unless the individual represents a continuing threat or is unlikely to answer the summons. *Id.* 10-2.2(c). This Court has "long referred to the[] ABA Standards as 'guides to determining what is reasonable.'" *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (original brackets and citations omitted). Virginia's arrest statute is itself modeled on the relevant ABA Standard, under which the arrest in this case lacked justification and

accordingly violated the Fourth Amendment. *See generally supra* at 3-6.[12]

But in any event, for the reasons discussed in the next section, such a contextual federal standard is unnecessary because there is no merit to petitioner's claim that this Court's Fourth Amendment jurisprudence precludes accounting for legislative judgments such as Virginia's determination that an arrest for misdemeanor offenses generally does not further governmental interests.

2. The Authority Cited By Petitioner And The United States Is Distinguishable Or Supports The Judgment Below.

As discussed above, this Court held in *Johnson* and *DeFillippo* that the constitutionality of an arrest for a state law offense turns on compliance with state law. A long line of other cases looks to state legislative determinations in assessing whether searches and seizures are reasonable. *See* Part I.D, *supra*. The authority on which petitioner relies does not in fact support its position.

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[12] The ABA maintains that governments should "requir[e] police officers to issue citations (rather than to arrest the offender) for minor offenses, except in" specified circumstances, because "pretrial custody by police is generally unwarranted for minor offenses." PRETRIAL RELEASE, *supra*, at 67 (commentary). With respect to the question presented by this case, the ABA concludes that although "the Fourth Amendment permits searches incident to arrests that do not result in the detention of the arrested person in a police or correctional facility, once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view)." *Id.* at 70 n.31.

a. Petitioner argues that *California v. Greenwood*, 486 U.S. 35 (1988), holds categorically "that the constitutional standard must operate independently of state law." Br. 18. That of course cannot be right: as noted, petitioner concedes – as it must – that state law plays a central role in the Fourth Amendment inquiry in a variety of contexts, including in defining the offense. *Greenwood* in fact stands for a more modest proposition and is properly distinguished.

The question in *Greenwood* was whether officers conducted a Fourth Amendment "search" when they examined garbage that the defendant had left outside the curtilage of his home. This Court's precedents provide that such a "search" occurs when the government intrudes on an expectation of privacy that society accepts as reasonable. This Court concluded in *Greenwood* that the defendant had no such expectation in his garbage, particularly given that the trash was effectively open to the public. The defendant (a California resident) nonetheless relied on the California Supreme Court's holding that such a search requires a warrant under that state's constitution (which imports its own distinct privacy standard). This Court deemed that fact irrelevant because it does not inform the relevant question under the Fourth Amendment: whether the defendant had an expectation of privacy that society was prepared to accept as reasonable. *See* 486 U.S. at 43 (rejecting defendant's assertion that his "expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law").

The role of Virginia law in this case is very different from the defendant's attempt to rely on the California Constitution in *Greenwood*. Here, the Fourth Amendment supplies the relevant inquiry: The arrest of respondent was a seizure and was "reasonable" if it was supported by a sufficient justification. Virginia law simply establishes that no such justification exists because the State has no interest in effecting the arrest. In *Greenwood*, by contrast, state law was invoked in an attempt to substitute a new state-law standard for the Fourth Amendment inquiry into whether the defendant had a reasonable expectation of privacy. That argument was properly rejected.

b. For its part, the United States relies on two further decisions – *Cooper v. California*, 386 U.S. 58 (1967), and *Whren v. United States*, 517 U.S. 806 (1996) – as supposedly deeming state law irrelevant to the Fourth Amendment reasonableness determination. S.G. Br. 5; *see also id.* at 11-12. Again, that is not correct, as it is clear that state law is highly relevant. Indeed, the Solicitor General misdescribes both cases, which in fact support the judgment below.

Cooper is an inventory search case. The police arrested the defendant and, pursuant to a specific directive in state law, impounded his car. 386 U.S. at 60. They then searched it, finding evidence of heroin sales. The defendant argued that the search violated the Fourth Amendment because state law did not expressly "authorize the officers to search [his] car." *Id.* at 61. In the language quoted by the Solicitor General, this Court held that the reasonableness of the search was not undermined by the fact that state law did not by its terms specify that a search could be conducted:

"Just as a search authorized by state law may be an unreasonable one under [the Fourth] [A]mendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Id.*

The Solicitor General asserts that *Cooper* deems state law irrelevant. In fact, precisely the opposite is true. The United States omits that the *reason* this Court deemed the search reasonable in the absence of express statutory authority was that *state law* empowered the officers to seize and hold the vehicle for a long period of time. It was thus essential to this Court's Fourth Amendment inquiry that "the officers seized petitioner's car because they were *required to do so by state law*." *Id.* at 61 (emphasis added). The search, in turn, "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained": "It would be unreasonable to hold that the police, *having to retain the car* in their custody for such a length of time, had no right, even for their own protection, to search it." *Id.* at 61-62 (emphasis added).

Cooper thus actually holds, consistent with the inventory search rulings noted in Part I.D, *supra*, that state law plays a central role in the Fourth Amendment calculus. *Compare Coolidge v. New Hampshire*, 403 U.S. 443, 464 n.21 (1971) ("In *Cooper*, the seizure of the petitioner's car was mandated by California statute, and its legality was not questioned. The case stands for the proposition that, *given an unquestionably legal seizure*, there are special circumstances that may validate a subsequent warrantless search.") (emphasis added), *with* S.G. Br. 5 (citing *Cooper* as "holding that state limitations on searches and seizures do not affect the reasonableness of the searches and seizures under

the Fourth Amendment"), *and id.* at 11 (discussing *Cooper* as the lead precedent for that proposition).

The other decision cited by the Solicitor General, *Whren v. United States*, is a pretext stop case. This Court held that the Fourth Amendment permits a traffic stop that is objectively justified by a violation of the law, whatever the officer's subjective intent. 517 U.S. at 813. The petitioners, however, urged the Court to reject the "normal" inquiry "of whether probable cause existed to justify the stop" (*id.* at 810), arguing that the officer's pretext could be demonstrated objectively by the fact that he had violated "usual police practices" embodied in a local police policy (*id.* at 814). The policy provided that a particular subgroup of officers – those in plainclothes who are traveling in unmarked vehicles – should generally not enforce traffic laws. *Id.* at 815. In addition to broadly rejecting any inquiry into pretext, this Court stated – in the language quoted by the Solicitor General – that "[w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Id.* (internal citations omitted).

As with *Cooper*, the Solicitor General misapprehends *Whren*, which in fact treats state law (in that case, the law of the District of Columbia) as highly relevant to the Fourth Amendment inquiry. The government omits that the petitioners, who were stopped after the officer observed them turning a corner without signaling and then speeding off, "accept[ed] that [the officer] had probable cause to believe that various provisions of the *District of Columbia traffic code* had been violated." 517 U.S. at 810 (citing 18 D.C. Mun. Regs. §§ 2213.4, 2204.3, and

2200.3) (emphasis added). A violation of state law was thus the basis for the stop in *Whren* because (as this Court explained) it is settled that, "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* The Court simply held that the local police practice did not overcome the settled understanding that a violation of state law authorizes a traffic stop. *Id.*

In the language cited by the government regarding "trivialities," this Court in *Whren* merely held that the right to stop the vehicle was not undercut by local police practices. This Court recognized that such a "basis of invalidation would not apply in jurisdictions that had a different practice" or even in the same jurisdiction if the officer "had been wearing a uniform or patrolling in a marked police cruiser." *Id.* at 815. Respondent's rule is perfectly consistent with *Whren*'s determination that incidental provisions of local law that do not go to the government's interest in a seizure do not figure in the Fourth Amendment reasonableness determination. As discussed, *supra*, an arrest is not reasonable if the suspect has not committed an arrestable offense. Other limitations on the arrest authority – such as whether the officer was in uniform or outside his jurisdictional boundaries – do not inform that determination.

C. Petitioner's Theory For Permitting Arrests That Are Forbidden Under State Law Will Undermine The Administrability Of The Criminal Laws.

Petitioner argues (Br. 39-44) that a rule which gives effect to state-law judgments concerning the necessity for an arrest would be inadministrable. In

fact, the opposite is obviously true. As the Solicitor General emphasizes, "[a] single, familiar standard is essential to guide police officers." Br. 16 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). The decision below aligns state law and the Fourth Amendment on the questions of whether the conduct is arrestable and thereby produces an administrable rule. Officers are trained in state law and there is no evidence that they face any difficulties in conforming their conduct to those rules. If an officer has probable cause to believe that an arrestable offense has occurred, the Fourth Amendment requirement of reasonableness is met. *Compare Atwater v. City of Lago Vista*, 532 U.S. 318, 418 (2003) (rejecting argument that Fourth Amendment should forbid arrests permitted by state law whenever offense was sufficiently minor because such a rule would "expect every police officer to know the details of frequently complex penalty schemes"). Contrary to petitioner's assertions that this approach is not practicable, the relevant U.S. Department of Justice report recognizes that, in fact, under citation release statutes, "screening procedures in the field are straightforward and uncomplicated." DEBRA WHITCOMB ET AL., CITATION RELEASE 11 (Washington, D.C., National Institute of Justice, 1984).

Petitioner's approach, by contrast, is less easily administered by officers on the street. By divorcing the Fourth Amendment reasonableness inquiry from the other rules that govern police conduct, it invites significant confusion as officers are held to conflicting state and federal standards as they effectuate custodial arrests. Petitioner's rule would also require creating a complicated overlay of federal jurisprudence to determine which minor regulatory offenses are "arrestable" as a matter of federal constitutional law,

notwithstanding that state law permits only the issuance of a citation.

Petitioner responds that under the Virginia Supreme Court's decision, arrests constitutional in one State may violate the Fourth Amendment in another. Br. 21. That is true but totally unexceptional, and it poses no concern for law enforcement officers on the street. The Fourth Amendment does not enforce universal homogeneity in governmental law enforcement interests and purposes. The legality of conduct, and hence the restrictions imposed by the Fourth Amendment on police activity, frequently varies from state to state. Thus, police activity that is perfectly constitutional in Virginia – such as arrests in pursuit of gambling activity – may violate the Fourth Amendment in Nevada. In addition, among many other examples, under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), identically conducted checkpoints may be constitutional in the city where their primary purpose is sobriety or license checks, while unconstitutional in another city which has as its primary purpose narcotics detection – and would certainly be unconstitutional where the checkpoint avowedly served no purpose at all. *See id.* at 46-47 & n.2.

Petitioner also expresses concern that it is sometimes difficult to determine whether an individual has committed an arrestable offense. Br. 42. But the Fourth Amendment does not require certainty; it only requires probable cause to believe that the offense supports arrest. A reasonable error does not violate the Fourth Amendment. As this Court stated long ago, "[i]n dealing with probable cause, * * * as the very name implies, we deal with probabilities." *Brinegar v.*

United States, 338 U.S. 160, 175 (1949). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed"; "[e]vidence required to establish guilt is not necessary." *Henry v. United States*, 361 U.S. 98, 102 (1959). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (internal quotation omitted). Additional protection is provided by the rule that reasonable mistakes are immune from liability under 42 U.S.C. § 1983. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Beyond that, to the extent that any genuine uncertainty exists (and petitioner offers no evidence that it does), it is by definition precisely the uncertainty that officers face every day in their application of state law. Here, of course, the officers made no such mistake. At trial, they claimed that the power to arrest was "just our prerogative." J.A. 15. In this Court, petitioner has abandoned any assertion that the officers had any reason to believe – even a mistaken one – that respondent had engaged in arrestable conduct.

But in any event, while administrative ease may inform this Court's evaluation of constitutional reasonableness, this Court has never held that administrability can supplant the Fourth Amendment's reasonableness balancing inquiry altogether, which is what petitioner's approach advocates. Hard or not, the Fourth Amendment forbids "unreasonable" searches and seizures. Petitioner's discomfort with the state interest side of that balance is understandable, but

such discomfort provides no justification for rewriting the Fourth Amendment's text to provide that persons are protected against unreasonable searches and seizures "unless it would be administratively difficult."[13]

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[13] The only issue for this Court to decide in this case is whether the officers' conduct violated the Fourth Amendment. The petition for certiorari and petitioner's merits brief did not squarely ask this Court to hold that, even if officers violated the Fourth Amendment, the exclusionary rule does not apply. Further, petitioner has waived that argument by not raising it in the Virginia Supreme Court. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Although petitioner's brief below contained a section nominally addressed to the "exclusionary rule," that section argued only that the officers' conduct did not violate the Fourth Amendment; petitioner did *not* argue that the evidence should not be excluded even if a Fourth Amendment violation had occurred. *See* Br. for the Commonwealth, *Moore v. Virginia*, 636 S.E.2d 395 (Va. 2006), 2006 WL 3910658 at *7-15. In any event, this Court has long "required suppression of evidence that was the product of a search incident to an unlawful arrest." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681 (2006) (citing *Miller v. United States*, 357 U.S. 301, 305 (1958)). This case falls squarely within the settled bounds of the exclusionary rule because the unlawful arrest and search were "sufficiently related to the later discovery of evidence to justify suppression." *Hudson v. Michigan*, 126 S. Ct. 2159, 2170 (2006) (Kennedy, J., concurring in part and concurring in the judgment).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Place, NW
Washington, D.C. 20016

S. Jane Chittom
Counsel of Record
Stacie A. Cass
OFFICE OF THE APPELLATE
DEFENDER
701 E. Franklin St., Ste. 1001
Richmond, VA 23219
(804) 225-3598

Thomas C. Goldstein
Steven C. Wu
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave.,
NW
Washington, D.C. 20036

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COMMONWEALTH OF VIRGINIA, PETITIONER

v.

DAVID LEE MOORE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

DAVID E. HOLLAR
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Fourth Amendment requires the suppression of evidence obtained in a search incident to an arrest that is based upon probable cause but not authorized by state law.

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In the Supreme Court of the United States

No. 06-1082

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

DAVID LEE MOORE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a search incident to an arrest by state police officers violates the Fourth Amendment if the arrest is based upon probable cause but contravenes state law. The United States prosecutes cases using evidence discovered through arrests made by state authorities, including arrests that violate state procedural rules. In addition, the decision in this case could affect the remedies required for violations of federal laws governing arrests by federal officers. The United States therefore has a substantial interest in this case.

STATEMENT

1. Under Virginia law, driving on a suspended license is a misdemeanor, punishable by a year in jail and

a $2500 fine. Va. Code Ann. §§ 18.2-11, 18.2-272, 46.2-301(C) (2004). A Virginia police officer may arrest an individual who commits that crime in the officer's presence if the offender fails or refuses to discontinue the offense, if the officer believes the offender is likely to disregard a summons, or if the officer reasonably believes the offender is likely to harm himself or others. *Id.* § 19-2.74. An officer may also make an arrest for that offense in any jurisdiction where "prior general approval has been granted by order of the general district court." *Id.* § 46.2-936. In other circumstances, the officer generally may only issue a summons and notice to appear in court. *Id.* § 19-2.74.

2. In February 2003, respondent's car was stopped by two Virginia police officers, who determined that he was driving on a suspended license. Believing they had the prerogative to make an arrest, the officers took respondent into custody. A search incident to the arrest revealed that he was carrying 16 grams of crack cocaine and $516 in cash. Pet. App. 1-2, 13-15; J.A. 15.

Respondent was indicted for possessing cocaine with intent to distribute it, in violation of Virginia law. He then moved to suppress the evidence obtained in the search. Although he conceded that the officers had probable cause to stop his vehicle and to charge him with driving on a suspended license, he argued that they violated Virginia law and the Fourth Amendment by arresting him rather than issuing a summons. Pet. App. 2; J.A. 19.

The trial court concluded that the arrest violated neither Virginia law nor the Fourth Amendment and denied the motion. J.A. 20-21. After a bench trial, the court found respondent guilty and sentenced him to five

years in prison, with eighteen months suspended. Pet. App. 2.

3. The Court of Appeals of Virginia reversed. Pet. App. 35-48. The court concluded that none of the exceptions to Virginia's prohibition on arrests for driving on a suspended license applied, and the officers were therefore required by state law to issue a summons. *Id.* at 37-39, 45-48. Because state law did not authorize respondent's arrest, the court held that the search incident to the arrest violated the Fourth Amendment. *Id.* at 39-44. The court stated that its holding was "a logical and necessary extension of" *Knowles* v. *Iowa*, 525 U.S. 113 (1998), which held that the Fourth Amendment prohibits a full search incident to the issuance of a traffic citation. Pet. App. 43-44. The court further ruled that the Fourth Amendment violation required suppression of the evidence obtained in the search and dismissal of the indictment against respondent. *Id.* at 48.

One judge dissented. Pet. App. 48-56. She concluded that, under *Atwater* v. *City of Lago Vista*, 532 U.S. 318 (2001), the Fourth Amendment permits arrest for any crime if the arresting officers have probable cause to believe the offense was committed in their presence, and state limitations on arrest have no bearing on the constitutional analysis. Pet. App. 49. Because Virginia does not apply the exclusionary rule for state law violations absent statutory direction, the dissent would have affirmed the denial of the motion to suppress. *Id.* at 51.

4. The en banc court of appeals reversed the panel. Pet. App. 12-27. The court held that, although the arrest violated Virginia law, the arrest and resulting search did not violate respondent's Fourth Amendment rights. *Id.* at 17. Relying on *Atwater*, the court explained that the arrest was constitutional because it was

based on probable cause, and "the issue of probable cause is determined separate and apart from whether an arrest violates a state statute." *Id.* at 22. The court further explained that the search incident to the arrest was likewise constitutional because "a search incident to an arrest that is based upon probable cause complies with the Fourth Amendment." *Ibid.* Because Virginia does not provide an exclusionary remedy for violations of its statutory restrictions on misdemeanor arrests, the court affirmed the trial court's denial of respondent's motion to suppress. *Id.* at 17. Four judges dissented on the ground that *Knowles* "compels the conclusion" that the search of respondent violated the Fourth Amendment. *Id.* at 27.

5. The Supreme Court of Virginia reversed. Pet. App. 1-11. Relying on *Knowles* and its own decision in *Lovelace* v. *Commonwealth*, 500 S.E.2d 267 (Va. 1998), which interpreted *Knowles*, the court held that the search of respondent violated the Fourth Amendment. Pet. App. 11. The court stated that, under Virginia law, the "officers were authorized to issue only a summons," and therefore, "under the holding in *Knowles*, the officers could not lawfully conduct a full field-type search." *Ibid.* Because the court concluded that the search violated the Fourth Amendment, it dismissed the indictment against respondent. *Ibid.*

SUMMARY OF ARGUMENT

The Fourth Amendment permits a search incident to an arrest based on probable cause even if the arrest violates state law.

A. This Court has consistently held that, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his pre-

sence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001). When a police officer makes a constitutionally valid arrest, the Fourth Amendment permits a search of the person incident to that arrest, in order to protect the officer's safety and to recover evidence of crime. *United States* v. *Robinson*, 414 U.S. 218 (1973). The Virginia Supreme Court held that a search incident to an arrest based on probable cause nonetheless violates the Fourth Amendment if the arrest contravenes state law. That ruling conflicts with numerous cases of this Court holding that state limitations on searches and seizures do not affect the reasonableness of the searches and seizures under the Fourth Amendment. See *Whren* v. *United States*, 517 U.S. 806, 819 (1996); *California* v. *Greenwood*, 486 U.S. 35, 43 (1988); *Cooper* v. *California*, 386 U.S. 58, 61 (1967); *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960).

B. Constitutionalizing state restrictions on searches and seizures also cannot be squared with this Court's repeated admonitions that Fourth Amendment rules should be uniform and easily administrable. The States place a multitude of restrictions on the arrest powers of law enforcement officers. Constitutionalizing those state rules would cause Fourth Amendment protections to vary from State to State, within the same State, and over time as States modify their rules of arrest. Moreover, many state restrictions on arrest turn on complex, fact-intensive inquiries that may be difficult for both arresting officers and reviewing courts to resolve. Constitutionalizing the myriad and often technical state restrictions on arrest therefore risks creating a "bog of litigation." *Wyoming* v. *Houghton*, 526 U.S. 295, 305 (1999).

C. Incorporating state restrictions on arrest into the Fourth Amendment would also seriously disrupt the traditional balance of federal and State authority. States would acquire the ability to expand and contract Fourth Amendment protections by changing their procedural rules governing arrest. At the same time, States would lose their traditional authority to calibrate the penalties for violations of their own laws, because violations of state arrest laws would automatically become Fourth Amendment violations and trigger constitutionally mandated remedies. And federal courts hearing damages actions under 42 U.S.C. 1983 would become the enforcers of state law arrest rules incorporated into the Fourth Amendment.

D. Constitutionalizing state restrictions on arrest might also expand the exclusionary rule, by greatly increasing the class of unconstitutional arrests. That would be particularly inappropriate, because those state law restrictions are often enacted for reasons other than the protection of Fourth Amendment interests and do not require suppression as a state-law remedy.

E. The Virginia Supreme Court mistakenly believed that its decision was compelled by *Knowles* v. *Iowa*, 525 U.S. 113 (1998). That decision is inapplicable. *Knowles* holds that a search incident to arrest is not justified when an officer merely issues a citation, but, here, respondent was actually arrested and taken into custody. Respondent mistakenly contends this Court has held that a search incident to an arrest violates the Fourth Amendment when the arrest contravenes state law. The Court, however, has never so held. See *United States* v. *Di Re*, 332 U.S. 581 (1948) (supervisory-powers rule to remedy in federal court an illegal, but not unconstitutional, arrest by federal officers); *Johnson* v. *United*

States, 333 U.S. 10, 15 & n.5 (1948) (dictum); *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979) (dictum).

Finally, respondent erroneously suggests that an arrest complies with the Fourth Amendment only if officers have probable cause to believe the suspect committed an "arrestable" offense under state law. That proposed limitation on an officer's search authority lacks any support in precedent and contradicts basic principles underlying the Fourth Amendment.

ARGUMENT

A SEARCH INCIDENT TO AN ARREST BASED ON PROBABLE CAUSE IS REASONABLE UNDER THE FOURTH AMENDMENT EVEN IF THE ARREST VIOLATES STATE LAW

A search is reasonable under the Fourth Amendment if it is incident to an arrest based on probable cause to believe that the person arrested was committing a crime. The Virginia Supreme Court has added to that established rule an additional and unjustified requirement that the arrest must also comply with state law. This Court should reject that effort to absorb state arrest law into the basic requirements of reasonableness under the Fourth Amendment.

A. The Fourth Amendment Permits A Search Incident To An Arrest Based On Probable Cause, And State Limitations On Searches And Seizures Do Not Affect The Constitutional Analysis

1. "With rare exceptions," the reasonableness of a search or seizure under the Fourth Amendment "is not in doubt where [it] is based upon probable cause." *Whren* v. *United States*, 517 U.S. 806, 817 (1996). Thus, outside the home, this Court has never required any-

thing more than probable cause for an arrest to comply with the Fourth Amendment. On the contrary, a long line of cases establishes that "[a] warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003).

The probable cause standard "has roots that are deep in our history." *Henry* v. *United States*, 361 U.S. 98, 100 (1959). It reflects the "ancient common-law rule" that warrantless arrests were permissible for misdemeanors or felonies committed in the arresting officer's presence, and for felonies committed outside his presence, if there was reasonable ground to believe a crime was committed. *United States* v. *Watson*, 423 U.S. 411, 418 (1976); *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 327-339 (2001). The probable cause test also comports with "traditional standards of reasonableness." *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999). As this Court has explained, it "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975). Probable cause "is a practical, nontechnical conception" that constitutes "the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of [police] officers' whim or caprice." *Ibid.* (citation omitted).

The probable cause test "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations," and regardless of the seriousness of the offense under state law. *Dun-*

away v. *New York*, 442 U.S. 200, 208 (1979). In *Atwater*, this Court recently reaffirmed the long-prevailing rule that,"[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. The offense in *Atwater*—failure to wear a seatbelt—was punishable only by a fine, *id.* at 323, and was therefore less serious than respondent's crime of driving on a suspended license, which is punishable by a year in jail. Although state law authorized the arrest in *Atwater*, *ibid.*, this Court did not suggest that the authorization was relevant to whether the arrest complied with the Fourth Amendment. And, although the Court noted that many jurisdictions impose additional restrictions on warrantless arrests, *id.* at 352, it never suggested that those restrictions might be incorporated into the constitutional analysis, which the Court held turned solely on probable cause, *id.* at 354.

2. When a police officer makes a constitutionally valid arrest, it is reasonable under the Fourth Amendment for the officer to search the person arrested as an incident to that arrest. The propriety of such searches was "always recognized under English and A·nerican law" and "has been uniformly maintained in many cases." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914).

In *United States* v. *Robinson*, 414 U.S. 218 (1973), the Court rejected a Fourth Amendment challenge to a search incident to arrest for a crime virtually identical to respondent's—"operating a motor vehicle after the revocation of [an] operator's permit." *Id.* at 220. The Court explained that searches incident to arrest are justified for two reasons: the need to ensure the safety of law enforcement officers and the interest in discovering

additional evidence. *Id.* at 234. The Court concluded that those justifications warrant a bright-line rule that a search is reasonable under the Fourth Amendment whenever there has been a constitutionally valid arrest, without inquiry into whether the justifications are actually implicated in a particular case. *Id.* at 236.

Although the Court described the authority to search as triggered by a "lawful arrest," it made clear that "lawful" means "constitutional." *Robinson*, 414 U.S. at 236. The Court explained that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* at 235. Other cases are in accord. For example, in *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964), the Court stated that "[t]he constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest," which turned on "whether, at the moment the arrest was made, the officers had probable cause." And, in *Adams* v. *Williams*, 407 U.S. 143, 149 (1972), the Court stated that, because the defendant's arrest "was supported by probable cause," "the search of his person and of the car incident to that arrest was lawful."

3. Respondent's arrest was validly based on probable cause under *Atwater*, and the officers conducted a valid search incident to arrest under *Robinson*. The Virginia Supreme Court nonetheless held that the search violated the Fourth Amendment because respondent's arrest violated Virginia law. That ruling conflicts with numerous cases of this Court holding that state limitations on searches and seizures do not affect the reasonableness of those searches or seizures under the Fourth Amendment.

As for searches, in *Cooper* v. *California*, 386 U.S. 58 (1967), the Court upheld the constitutionality of the search of an automobile impounded upon the defendant's arrest. Noting the lower court's conclusion that state law did not authorize the search, this Court held that the lack of authorization was irrelevant to the constitutionality of the search under the Fourth Amendment: "Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Id.* at 61.[1]

In *California* v. *Greenwood*, 486 U.S. 35 (1988), the Court again refused to incorporate state law into the Fourth Amendment. The Court held that a search of the defendants' garbage did not violate the Fourth Amendment because they had no reasonable expectation of privacy in their trash. The Court rejected the contention that a reasonable expectation of privacy existed because the search was prohibited by California law. The Court explained that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.* at 43.

The same principle holds true for seizures. In *Whren*, the Court held that a traffic stop complies with

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[1] Even before *Cooper*, in *Elkins* v. *United States*, 364 U.S. 206 (1960), the Court had stressed that the test for whether a search is constitutional "is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 224. See *Preston* v. *United States*, 376 U.S. 364, 366 (1964) (applying *Elkins* to a search incident to arrest).

the Fourth Amendment, regardless of the motivation for the stop, if police officers have probable cause to believe that the motorist committed a traffic violation. 517 U.S. at 819. In so holding, the Court rejected the defendants' reliance on a local police regulation that prohibited the stop. *Id.* at 815. The Court explained that such limitations "vary from place to place and from time to time," but the Fourth Amendment's protections are not "so variable." *Ibid.*[2]

State law, of course, is relevant to the reasonableness of an arrest in one sense: the relevant substantive law informs whether officers can reasonably believe that a person is engaged (or has engaged) in conduct that violates that law, and thus whether the officer has probable cause. But the States' responsibility for defining crimes does not justify a rule that state procedural limits on searches and seizures define Fourth Amendment protections. That rule is foreclosed by precedent and inconsistent with the Amendment's role in guaranteeing all citizens certain fundamental protections that reflect our national heritage and common law traditions. See *Weeks*, 232 US. at 391.[3]

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[2] The Fourth Amendment rule is also consistent with the treatment of violations of state law in the qualified immunity inquiry. The fact that an officer's conduct violated state law or regulations does not result in a finding that the prohibition on the officer's conduct was clearly established. See, *e.g.*, *Davis* v. *Scherer*, 468 U.S. 183, 193-196 (1984). The reasons for refusing to conflate the state law and federal law inquiries in that context also apply in the Fourth Amendment context.

[3] In the context of searches or seizures for which no individualized suspicion is required, such as inventory and administrative searches, the Court has looked to the existence of state policies governing police actions in determining that the actions are reasonable under the Fourth Amendment. See, *e.g.*, *Florida* v. *Wells*, 495 U.S. 1, 4 (1990); *New York* v. *Burger*, 482 U.S. 691, 703 (1987). Some lower courts have held that

B. Constitutionalizing State Restrictions Would Balkanize Fourth Amendment Protections And Unduly Complicate Constitutional Analysis

The rule adopted by the court below also conflicts with this Court's repeated admonitions that Fourth Amendment rules should be uniform and easily administrable.

1. This Court has often noted the "important need for uniformity in federal law." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983). The Court has placed particular importance on uniformity in the Fourth Amendment context. See *Devenpeck* v. *Alford*, 543 U.S. 146, 154 (2004) (rejecting proposed rule that would result in "arbitrarily variable protection"); *Whren*, 517 U.S. at 815 (rejecting rule that would make Fourth Amendment protections "vary from place to place and from time to time").

Because the rule adopted by the Virginia Supreme Court constitutionalizes state restrictions on arrest, it would result in the "arbitrarily variable protection" that this Court has rejected. The States place numerous limitations on the arrest powers of law enforcement officers. States limit authority to arrest based on who commits the crime, who the victim is, where the crime occurs, when the crime occurs, the value of what is taken, who the arresting officer is, what the officer is wearing,

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the Fourth Amendment is violated when those state policies are not followed. See, *e.g.*, *United States* v. *Proctor*, 489 F.3d 1348, 1354 (D.C. Cir. 2007) (inventory search); *United States* v. *Knight*, 306 F.3d 534, 535-536 (8th Cir. 2002) (administrative search). In the context of suspicionless searches and seizures, the existence of standardized state policies provides protection against arbitariness. No corresponding need to inquire into state policies exists in the context of a search incident to an arrest that is based upon individualized probable cause.

when the arrest occurs, where the arrest occurs, and where the nearest judicial officer is located.[4] Different States apply different rules to the same situation. This case provides a good example: Like Virginia, some States generally prohibit warrantless arrests for driving on a suspended license. See, *e.g.*, Pet. App. 37-39; *State* v. *Bricker*, 134 P.3d 800, 803 (N.M. Ct. App. 2006); *Commonwealth* v. *Baez*, 678 N.E.2d 1335, 1338 (Mass. App. Ct. 1997). Other States generally permit warrantless

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[4] See, *e.g.*, Ark. Rev. Stat. Ann. § 16-81-102(a)(1) (2005) (prohibiting arrest, within 15 days of a legislative session, of state legislators, their clerks, sergeants-at-arms, or doorkeepers); Md. Code Ann. Crim. Proc. §§ 2-202 to 2-204 (LexisNexis 2001) (generally limiting warrantless misdemeanor arrests to offenses committed in officer's presence but creating exception for, *inter alia*, battery of "the person's spouse or another person with whom the person resides"); Idaho Code Ann. § 19-603 (2004) (authorizing arrest for misdemeanors committed outside presence of officer if reasonable cause to believe crime committed "aboard an aircraft"); N.H. Rev. Stat. Ann. § 594:10 (LexisNexis 2003) (requiring that misdemeanor arrest be committed in presence of officer but creating exception for specified crimes of domestic violence committed "within the past 12 hours"); Minn. Stat. Ann. § 609.52(3), 629.34(1)(c)(1)-(5) (West Supp. 2007) (prohibiting warrantless arrests for theft of less than $500 if committed outside officer's presence); Cal. Penal Code § 830.32 (West Supp. 2007) (community college police may arrest only if there is "immediate danger to person or property" or escape is in progress); Ind. Code Ann. § 9-30-2-2 (LexisNexis 2004) (officer must be in uniform and marked vehicle to arrest for traffic offense); Nev. Rev. Stat. Ann. § 171.124 (LexisNexis 2006) (forbidding warrantless arrests at night except for felonies or gross misdemeanors); Ohio Rev. Code Ann. § 2935.03(A)(1) (LexisNexis Supp. 2007) (restricting arrests to "within the limits of [an arresting officer's] political subdivision," subject to limited exceptions); Alaska Stat. §§ 12.25.030, 12.25.035 (2006) (waiving in-the-presence requirement for misdemeanors if "personal or property damage" is likely absent arrest and "there is no known judicial officer * * * within a radius of 25 miles").

arrests for that crime. See, *e.g.*, *State* v. *Valenzuela*, 898 P.2d 1010, 1012 (Ariz. Ct. App. 1995); *State* v. *Pulfrey*, 111 P.3d 1162 (Wash. 2005); *State* v. *Lopez*, 588 A.2d 318, 319 (Me. 1991). Consequently, under the rule adopted below, a search incident to an arrest based on probable cause to believe that a motorist was driving on a suspended license would violate the Fourth Amendment in Virginia, New Mexico, and Massachusetts, but not in Arizona, Washington, and Maine.

Indeed, Fourth Amendment protections could vary even within the same State. For example, Virginia's prohibition on warrantless arrests for driving on a suspended license does not apply in jurisdictions where "prior general approval has been granted by order of the general district court." Va. Code Ann. § 46.2-936 (2004). Thus, respondent's search would not have violated the Fourth Amendment in such a jurisdiction, even though it violated the Amendment in the rest of the State.

In addition, Fourth Amendment protections would change whenever a State changed its rules of arrest. For example, in 1969, North Dakota modified its law governing nighttime arrests to permit warrantless arrests for driving while intoxicated even when the offense is committed outside the officer's presence. See *City of Minot* v. *Knudson*, 184 N.W.2d 58, 63-64 (N.D. 1971). Under the rule adopted below, the meaning of the Fourth Amendment in North Dakota changed when that law was enacted. Before enactment, a nighttime arrest for driving while intoxicated violated the Fourth Amendment unless the arresting officer was present when the offense was committed. After enactment, the same arrest for the same crime no longer contravened the Fourth Amendment. This Court should not countenance

a rule under which "the search and seizure protections of the Fourth Amendment are so variable." *Whren*, 517 U.S. at 815.

2. The Court has also emphasized the value of "simplicity and clarity" in Fourth Amendment rules. *Dunaway*, 442 U.S. at 213. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 213-214. The Virginia Supreme Court's decision cannot be reconciled with that "essential interest in readily administrable rules." *Atwater*, 532 U.S. at 347.

Many state restrictions on arrest turn on complex, fact-intensive inquiries that may be difficult for both arresting officers and reviewing courts to resolve. For example, Virginia law would have authorized respondent's arrest if the arresting officers reasonably believed he was likely to disregard a summons or to harm himself or others, or if he failed to discontinue the offense. Va. Code Ann. § 19-2.74 (2004). There can be considerable uncertainty whether those conditions are satisfied. Indeed, that question was litigated extensively below. Pet. App. 16-19, 45-48. Laws limiting territorial authority to arrest also illustrate the complexities presented by incorporating state restrictions into the Fourth Amendment. For example, Virginia provides that an officer's authority to arrest generally extends one mile beyond the boundary of his jurisdiction, but only 300 yards beyond "towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more." Va. Code Ann. § 19.2-250 (2004).

Although police officers must comply with such complex restrictions on their arrest authority to satisfy state law, constitutionalizing those restrictions would present problems of a different order. Violations of constitutional rules generally have significantly more severe consequences than violations of state laws. Constitutional violations usually trigger the exclusionary rule and may expose officers to liability under 42 U.S.C. 1983. Claims of constitutional violations also often arise in federal court actions. Federal courts are less familiar with state provisions governing arrest and may find them difficult to interpret and apply. Moreover, federal court Fourth Amendment decisions could be undermined by subsequent state Supreme Court decisions that construe state law restrictions on arrest differently than the federal court did. Thus, constitutionalizing the myriad state restrictions on arrest risks creating a "bog of litigation" that will burden courts, expose state officers to federal liability, and result in the suppression of reliable evidence. *Houghton*, 526 U.S. at 305.

C. Constitutionalizing State Restrictions Would Disrupt The Balance Of State And Federal Authority

Incorporating state restrictions on arrest into the Fourth Amendment would also seriously unsettle the traditional allocation of authority between the States the federal government.

1. This Court has repeatedly held that the States lack authority to expand or contract Fourth Amendment protections. Although "'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitu-*

tional law when this Court specifically refrains from imposing them.'" *Arkansas* v. *Sullivan*, 532 U.S. 769, 772 (2001) (quoting *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975)). But that is precisely what constitutionalizing state restrictions on searches and seizures would permit States to do. They could alter the scope of substantive Fourth Amendment protections merely by changing their own laws.[5]

This case provides a good illustration: In *Robinson*, the Court held that the Fourth Amendment permitted a search incident to an arrest based on probable cause to believe the defendant had committed essentially the same crime that respondent committed here. If this Court affirmed the decision below, *Robinson* would no longer accurately state the Fourth Amendment rule in Virginia. And Virginia, by enacting a state restriction on arrest, would have expanded the Fourth Amendment beyond what this Court held necessary in *Robinson*.

2. Constitutionalizing state restrictions on arrest would also upset the federal-state balance in other ways. Traditionally, each State has determined for itself the appropriate response to violations of state limitations on arrest. Some States apply the exclusionary rule as a remedy, see, *e.g.*, *State* v. *Brown*, 792 N.E.2d 175, 179 (Ohio 2003), while others provide less drastic penalties, such as money damages, see, *e.g.*, *Garrett* v. *City of Bossier City*, 792 So. 2d 24 (La. Ct. App. 2001). This Court has repeatedly held that the choice of remedy for a state law violation is the prerogative of the State, not a question of federal constitutional law. In *Greenwood*,

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[5] However this Court resolves the question in *Danforth* v. *Minnesota*, No. 06-8273 (argued Oct. 31, 2007), there can be no question that States cannot alter the substantive scope of federal constitutional rights.

the Court rejected an argument that the Constitution required California to impose the exclusionary rule for violations of the State's prohibition on warrantless searches of trash. 486 U.S. at 44-45. And, in *Cooper*, the Court held that California was free "to apply its own state harmless-error rule to" determine the remedy for an automobile search that, although permissible under the Fourth Amendment, violated state law. 386 U.S. at 62. If state laws governing searches and seizures were incorporated into the Fourth Amendment, the States would lose control over the remedies for violations of their own laws.

Again, this case illustrates the problem. Although Virginia prohibits some arrests otherwise permitted by the Fourth Amendment, it generally provides a remedy other than the exclusionary rule for violations of those prohibitions. Under Virginia law, a person arrested without adequate justification may sue in tort for damages. See *Jordan* v. *Shands*, 500 S.E2d 215, 218 (Va. 1988). Virginia generally reserves the exclusionary rule for cases involving "an error of constitutional dimension." *Tharp* v. *Commonwealth*, 270 S.E.2d 752, 755 (Va. 1980). Thus, but for the transformation of the state law violation into a Fourth Amendment violation, Virginia would not apply the exclusionary rule for the violation here. Pet. App. 25-27. Nonetheless, the Virginia Supreme Court's incorporation of state law into the Fourth Amendment led that court to suppress probative evidence that respondent had committed a serious drug offense and to dismiss the indictment against him. *Id.* at 11.

Just as this Court weighs the benefits of the exclusionary rule against its costs when deciding whether to extend it to specific constitutional violations, *Hudson* v.

Michigan, 126 S. Ct. 2159, 2165 (2006), States should be free to decide that certain rights they have created are not sufficiently critical to merit the exclusion of valuable evidence. Indeed, if States were forced to choose between enacting a procedural protection the violation of which would necessarily result in exclusion of reliable evidence and forgoing the protection, they might well choose the latter. See *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (refusing to exclude evidence obtained in violation of federal agency regulations because mandating exclusion might deter promulgation of administrative privacy protections). But nothing in the federal Constitution forces that choice on the States. States may regulate constables *and* decide the appropriate remedy when the constable blunders.

3. The decision below would also disrupt the federal-state balance because state officials who violate the Fourth Amendment may face damages actions in federal court under Section 1983. Consequently, if violations of state restrictions on searches and seizures qualified as Fourth Amendment violations, federal courts would effectively become enforcers of those state laws.

This Court has never recognized "an action in federal court for arrests by state officers who simply exceed their authority." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 737 (2004). Indeed, the Court has rejected interpreting federal law to produce that "breathtaking" result. *Id.* at 736. That is unsurprising, because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984). Yet the Virginia Supreme Court's rule would conscript the

Fourth Amendment to produce that result, which "conflicts directly with the principles of federalism." *Ibid.*

4. Respondent argues (Br. in Opp. 22) that, absent the Virginia Supreme Court's rule, state officers could violate arrest procedures in States that mandate exclusion as a remedy with the knowledge that the evidence could be provided to federal authorities for use in federal court. This case does not present that concern, because Virginia does not mandate exclusion for the violation here, and this prosecution was brought in state court. In any event, the concern is misplaced. Each year, approximately nine million people are charged with misdemeanors, but only 70,000 are indicted in federal court. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 782 & n.5 (2006); *Sourcebook of Criminal Justice Statistics Online* (2005) <http://www.albany.edu/sourcebook/pdf/t582005.pdf>. It is difficult to imagine that state officers would routinely arrest individuals in violation of state law in the hope of finding evidence that could be used only in the unlikely event an independent sovereign elected to press charges. That scenario is particularly implausible because unlawful arrests may expose officers to internal discipline and civil suits. See *Hudson*, 126 S. Ct. at 2168; pp. 18–19, *supra*. "[T]he country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Atwater*, 532 U.S. at 353. Affirming the long-standing rule that States may fashion their own remedies for violations of their own laws is unlikely to trigger one.

D. Constitutionalizing State Restrictions Threatens Inappropriate Expansion Of The Exclusionary Rule

Although Fourth Amendment violations do not always require suppression, see *Hudson*, 126 S. Ct. at 2165, courts generally apply the exclusionary rule when they conclude that a search was unreasonable under the Fourth Amendment. The Virginia Supreme Court did so here. Pet. App. 11. It is unclear whether this Court would agree that exclusion is warranted when the alleged Fourth Amendment violation depends on a failure to comply with state restrictions on searches and seizures. If it does agree, however, the result will be the routine use of the exclusionary rule to remedy violations of state law.

That would be a significant and inappropriate expansion of the suppression remedy. Because the social costs of the exclusionary rule are very high, the Court has stressed that it should be applied only when clearly justified. See *Hudson*, 126 S. Ct. at 2163; *United States* v. *Leon*, 468 U.S. 897, 906-908 (1984). The Court generally does not apply the suppression remedy for non-constitutional violations, including violations of federal statutes, treaties, and regulations. See *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2680 (2006); *Caceres*, 440 U.S. at 755-757; *United States* v. *Donovan*, 429 U.S. 413, 431-439 (1977). And the Court has likewise refused to apply the exclusionary rule in response to violations of state statutes, even when those statutes regulate searches and seizures. See *On Le* v. *United States*, 343 U.S. 747, 754-755 (1952); *Olmstead* v. *United States*, 277 U.S. 438, 466-469 (1928).

To be sure, even if this Court adopted the Virginia Supreme Court's rule, the Court could conclude that ap-

plying the exclusionary rule as a remedy for violations of state restrictions on arrest is unwarranted, at least in certain cases, because those restrictions are often enacted for reasons other than protecting privacy interests. For example, territorial limits on arrest powers are typically enacted "to 'protect the rights and autonomy of local governments' in the area of law enforcement." *State* v. *Hamilton*, 638 N.W.2d 92, 98 (Mich. 2002) (citation omitted). Prohibitions on traffic stops by non-uniformed officers are designed "to protect drivers from police impersonators and to protect officers from resistance should they not be recognized as officers." *Bovie* v. *State*, 760 N.E. 2d 1195, 1199 (Ind. Ct. App. 2002). Even statutes that permit or require citation instead of arrest are frequently aimed at saving the time and money involved in processing arrests rather than shielding citizens from unreasonable seizures. See Judge Warren Davis, *Should Georgia Change Its Misdemeanor Arrest Laws to Authorize Issuing More Field Citations?*, 22 Ga. St. U. L. Rev. 313, 317-336 (2005); Floyd F. Feeny, *Citation in Lieu of Arrest: The New California Law*, 25 Vand. L. Rev. 367, 367–371 (1972). This Court has admonished that the exclusionary rule is appropriate only to remedy violations that "implicate[] important Fourth and Fifth Amendment interests." *Sanchez-Llamas*, 126 S. Ct. at 2681. Applying the rule to remedy violations of state restrictions on arrest, which often serve purposes unrelated to those constitutional provisions, cannot be squared with that admonition.

But an exclusionary rule jurisprudence that conditions the appropriate remedy on a further inquiry into state law—particularly an inquiry into the underlying purpose of the state limitation—has little to recommend

it and is unnecessary in any event. The more fundamental reason to reject the Virginia Supreme Court's rule is that state law violations should never render an arrest unconstitutional in the first place.

E. Neither This Court's Decisions Nor Respondent's Attempt To Define An Arrestable Offense By Reference To State Law Justifies Departing From the Fourth Amendment Rule That An Arrest Is Reasonable If It Is Based On Probable Cause

1. The Virginia Supreme Court believed that its holding was compelled by *Knowles* v. *Iowa*, 525 U.S. 113 (1998). The court was mistaken.

Knowles involved a full search of an automobile conducted after the driver was issued a citation but not placed under arrest. 525 U.S. at 114. Because the officers did not make an arrest, the search could not be justified under the rule, recognized in *Robinson*, that the Fourth Amendment permits a search incident to a constitutionally valid arrest. The Court reasoned that the rationales for permitting searches incident to arrest are not sufficiently implicated where officers only issue a citation. When a defendant is released rather than handcuffed and transported to a distant location, the encounter is likely to be briefer and less confrontational, minimizing the danger to the officers. *Id.* at 117. Moreover, officers typically have little need to discover additional evidence. *Id.* at 118. At the same time that the Court in *Knowles* refused to adopt a rule permitting a "search incident to citation," it reaffirmed the vitality of *Robinson*'s "bright-line rule" permitting "a full field search as incident to an arrest." *Ibid.*

Knowles has no application here, because respondent was arrested and transported from the scene, not issued

a citation and released. Because respondent's arrest was constitutionally valid, the search of respondent incident to his arrest was constitutionally permissible under the bright-line rule in *Robinson*.

Respondent contends (Br. in Opp. 21) that a Fourth Amendment prohibition on arrest when state law authorizes only citation is necessary to prevent circumvention of *Knowles*, because otherwise officers will arrest suspects in violation of state law in order to search them for evidence of other crimes. Respondent, however, has not identified any evidence that misdemeanor arrests have increased in States that bar use of the exclusionary rule to remedy violations of state limits on arrest. Indeed, "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. Moreover, as discussed above, officers who arrest in violation of state law risk internal discipline and civil damages suits. Given those potentially high costs, it is unlikely that rogue officers will arrest and search people who have committed minor crimes on the off-chance of discovering evidence of some more serious offense. If an officer did so, this Court has traditionally "assume[d]" that such "unlawful police behavior would 'be dealt with appropriately' by the authorities." *Hudson*, 126 S. Ct. at 2168 (citation omitted).

2. Respondent also contends (Br. in Opp. 16-20) that this Court's decisions hold that a search incident to arrest violates the Fourth Amendment when the arrest contravenes state law. That is incorrect. The Court has never held a search unconstitutional because the underlying arrest violated a state law requirement.

Respondent principally relies (Br. in Opp. 18-20) on *United States* v. *Di Re*, 332 U.S. 581 (1948). That deci-

sion, however, was not grounded in the Fourth Amendment but "was 'based on nonconstitutional considerations.'" 1 Wayne R. LaFave, *Search and Seizure* § 1.5(b) at 168 (4th ed. 2004) (LaFave) (quoting *Street* v. *Surdyka*, 492 F.2d 368, 372 n.7 (4th Cir. 1974)). This Court reversed the defendant's federal court conviction for possessing counterfeit gasoline coupons, which were found on his person in a search incident to his arrest. The arrest, although "for a federal offense," was "made by a state officer accompanied by federal officers who had no power of arrest." *Di Re*, 332 U.S. at 591. Given those circumstances, the parties disputed whether state or federal law governed the officer's authority to make the arrest. *Id.* at 588-589. The Court resolved that dispute by concluding that, "in absence of an applicable federal statute[,] the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. The Court further concluded that the arrest was not authorized by New York law, which permitted arrest for a felony only if "the officer had reasonable grounds to believe the suspect had committed" one. *Id.* at 591. In discussing the lawfulness of the arrest, the Court never mentioned the Fourth Amendment. See *id.* at 587-595. *Di Re* is thus best understood, not as a Fourth Amendment ruling, but as an effort by the Court to clarify the law federal courts should use to determine the lawfulness of arrests for federal offenses. "So interpreted, *Di Re* is simply an instance of the Court utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional federal arrest." LaFave § 1.5(b) at 169.

In any event, although the Court did not analyze the case this way, the requirement of New York law that the Court found unsatisfied in *Di Re* mirrored the constitu-

tional requirement for a valid arrest. See 332 U.S. at 594-595 (equating "reasonable grounds" requirement with"probable cause" standard). Thus, even if *Di Re* were treated as a constitutional decision, its result would be consistent with the Fourth Amendment rule that nothing more than an arrest supported by probable cause is required to support a valid search incident to that arrest.

This Court cited *Di Re* in *Miller* v. *United States*, 357 U.S. 301 (1958), and *Johnson* v. *United States*, 333 U.S. 10 (1948). But neither of those cases transformed *Di Re*'s supervisory-powers ruling into a Fourth Amendment holding.

In *Miller*, federal agents conducted a search incident to an arrest made after they entered a home without knocking and announcing their presence. Citing *Di Re*, the Court stated that the validity of the arrest should be determined based on local law, but the Court then observed that the government had conceded that the entry should also be judged by the standards in a federal statute, 18 U.S.C. 3109. *Miller*, 357 U.S. at 305-306. After concluding that the entry did not comply with Section 3109, the Court ordered the suppression of the evidence discovered in the search. *Id.* at 307-314. Because *Miller* turned on the meaning of Section 3109, this Court has viewed it as a non-constitutional decision involving the exercise of the Court's supervisory authority. See *Sanchez-Llamas*, 126 S. Ct. at 2681; *Wilson* v. *Arkansas*, 514 U.S. 927, 934 & n.3 (1995); *Ker* v. *California*, 374 U.S. 23, 39 (1963) (plurality opinion); *id.* at 53 (opinion of Brennan, J., joined by Warren, Douglas, and Goldberg, JJ.).

In *Johnson*, the Court suppressed evidence discovered in a search of the defendant's residence after police

officers entered without a warrant or exigent circumstances. The Court held that the search was not justified as incident to the defendant's arrest, but not because the arrest was unlawful. Rather, the Court held that the search began when the officers entered the residence, and, at that time, they did not yet have probable cause to arrest. The Court's footnoted citation to *Di Re* for the proposition that state law determines the validity of warrantless arrests was therefore dictum. 333 U.S. at 15 n.5. Moreover, the state arrest law in *Johnson* paralleled the constitutional "probable cause" standard, see *id.* at 15, so *Johnson* presents no conflict with the principle that the Fourth Amendment permits searches incident to arrests supported by probable cause.

Respondent's reliance (Br. in Opp. 17-18) on *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), is also misplaced. In *DeFillippo*, the Court upheld the validity of a search incident to an arrest based on probable cause to believe that the defendant had violated an ordinance that was later declared unconstitutional. In reaching its holding, the Court reaffirmed the established rule that "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *Id.* at 36. The Court concluded that the arrest and subsequent search were constitutionally valid because, when they were made, the arresting officer had "abundant probable cause" to believe that the defendant had violated a "presumptively valid ordinance." *Id.* at 37. The Court stated in passing that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* at 36. But that observation played no role in the Court's decision because, as

the Court explained, the defendant did not contest that his arrest complied with state law. *Ibid.*[6]

Respondent's suggestion (Br. in Opp. 8-9) that a search incident to an arrest that violates state law is unconstitutional, even though the arrest itself is constitutional, is also inconsistent with numerous cases, including *Robinson*, *Beck*, and *Adams*, which make clear that the constitutional validity of a search incident to arrest follows from the constitutional validity of the arrest. See p. 10, *supra*. Indeed, respondent's argument is difficult to square with *DeFillippo* itself, which upheld the validity of both the arrest and the search incident to the arrest and seemed to view the latter as flowing naturally from the validity of the former. See 443 U.S. at 40.

Respondent's proposed rule also makes no sense. Searches incident to arrest are justified because of the need to ensure the safety of the arresting officers and the interest in discovering additional evidence. Those justifications apply with equal force regardless of whether the arrest complies with state law. Moreover, it would be incongruous for the constitutional validity of a search incident to arrest to turn on state law when state law determines neither the constitutionality of the arrest itself nor the constitutionality of other types of searches, see *Elkins*, *supra*; *Greenwood*, *supra*.

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[6] In *Ker*, a plurality of the Court also stated in passing that the lawfulness of state arrests is determined by state law. See 374 U.S. at 37. But the plurality concluded that the arrests complied with state law, *id.* at 37-38, and the Court upheld the arrests and the subsequent search as reasonable under the Fourth Amendment, *id.* at 44 (plurality opinion); *id.* at 46 (concurring opinion of Harlan, J.). *Ker* therefore does not hold that a search violates the Fourth Amendment if it is incident to an arrest that contravenes state law.

3. Respondent's "alternative" argument in defense of the judgment below— that an arrest complies with the Fourth Amendment only if there is probable cause to believe the suspect committed "an *arrestable* offense" under state law (Br. in Opp. 28)—also lacks merit. Respondent cites no decision of this Court that even hints at such a requirement. Moreover, an "arrestable" offense requirement would present all of the problems with constitutionalizing state restrictions on searches and seizures discussed above.

An attempt to limit those problems by constitutionalizing only certain state restrictions on arrest would raise additional difficulties. Most significant, no logical principle would cleanly divide those state restrictions that should be incorporated into the Fourth Amendment and those that should not. Respondent proposes to constitutionalize only state laws that declare that an offense is "categorically not subject to arrest by any officer." Br. in Opp. 27. But he offers no reason why that limitation should be treated differently under the Fourth Amendment from other state laws defining when searches and seizures are permissible. For example, why should a state prohibition on arrest, however categorical, be treated differently from the categorical state prohibition on garbage searches that this Court refused to incorporate into the Fourth Amendment in *Greenwood*? It is also far from clear that the Virginia law at issue here qualifies under respondent's test. Although that law generally prohibits arrests for driving on a suspended license, the prohibition has numerous exceptions, including one that authorizes arrests in all circumstances in any jurisdiction where the general district court has given prior approval. See p. 2, *supra*. This Court should avoid the quagmire presented by respon-

dent's proposal and reaffirm the simple, longstanding rule that a search incident to an arrest based on probable cause complies with the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

DAVID E. HOLLAR
Attorney

NOVEMBER 2007

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No. 06-1082

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

—v.—

DAVID LEE MOORE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF RESPONDENT

REBECCA GLENBERG
ACLU OF VIRGINIA FOUNDATION
530 East Main Street
Suite 310
Richmond, Virginia 23219
(804) 644-8022

SUSAN N. HERMAN
Counsel of Record
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7945

STEVEN R. SHAPIRO
EMILY CHIANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, non-profit organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has participated in numerous Fourth Amendment cases before this Court including, of particular note here, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and *Knowles v. Iowa*, 525 U.S. 113 (1998). The ACLU of Virginia is a statewide affiliate of the national ACLU.

STATEMENT OF THE CASE

The Virginia state officers involved in this case concededly violated state law and aggressively exploited constitutional law exceptions designed for exigencies in circumstances where there was no exigency, all in a transparent attempt to avoid the Fourth Amendment's requirement that they obtain a warrant before searching respondent David Lee Moore and his hotel room.

The initial stop of Moore, according to the officers involved, was due to a mistake. Officers Anthony and McAndrew were discussing the fact

[1] Both parties have lodged blanket letters of consent with the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

that a man nicknamed "Chubs" was driving a car in their area. Although this fact did not seem remarkable in itself, Detective Karpowski, who overheard their conversation on his police radio, was aware that a man nicknamed "Chubs," one Christopher Delbridge, had recently been released from a federal penitentiary and had been driving on a suspended license. (Karpowski said he had learned this because he had stopped Delbridge the week before.) Karpowski radioed the other officers and told them that "Chubs" was driving with a suspended license and that they should stop his vehicle.

The officers stopped the car in question, which was actually being driven by David Lee Moore, not the individual known to Detective Karpowski. Amazingly enough, Moore, who evidently was also nicknamed "Chubs," was also driving on a suspended license.

At this point, Virginia law required the officers to do no more than give Moore a summons for committing a misdemeanor and then release him.[2] The only exceptions to this rule provided by the

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[2] "Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence . . . the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody." Va. Code § 19.2-74(A)(1).

Virginia Code, under which an arrest would have been permitted, did not apply in this case.[3]

Despite the clear command of Virginia law, the officers placed Moore under arrest for committing the misdemeanor of driving with a suspended license, handcuffed him, and advised him of his *Miranda* rights. Their reason for arresting him, and the reason for their initial interest in his presence in the area, quickly became apparent. Officer Anthony asked Moore whether he had any narcotics on his person and where he was staying. When Moore replied that he was staying at an Econo-Lodge in Chesapeake, he was taken to Officer McAndrew's vehicle where he was asked to sign a consent form allowing the officers to search his hotel room without a warrant. He signed the form. He was then placed in the police car, but was not searched. The officers later explained this as another mistake – Officer McAndrew said he was under the impression that Moore had already been searched. The officers then called animal control to pick up the dog in Moore's car and, after waiting forty-five minutes for their arrival, drove Moore to his hotel room so they could conduct their search. There, Officer McAndrew somehow realized that Moore had not yet been searched. The officers performed a protective sweep of the room and a search of Moore's person, finding 16 grams of crack cocaine and $516.

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[3] Section 19.2-74(A)(1) allows warrantless arrests for Class 1 and Class 2 misdemeanors only if the person fails or refuses to discontinue the unlawful act, or is believed to be likely to disregard a summons or to cause harm to himself or any other person.

Officer Anthony testified that Moore was not released immediately because "we were still in the middle of an investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, . . . also conducting a narcotics investigation." *Moore v. Commonwealth*, 47 Va. App. 55, 60, 622 S.E.2d 253, 256 (2005) (*en banc*). These facts do not describe a search incident to arrest, but an arrest incident to the desire to search both Moore and his hotel room. Virginia law clearly required the officers to obtain a search warrant before doing so.

The trial court denied Moore's motion to suppress the cocaine and he was convicted of a drug offense. On appeal, a divided Court of Appeals voted to reverse the conviction, 45 Va. App. 146, 609 S.E.2d 74 (2005). On rehearing *en banc*, a divided Court of Appeals affirmed the conviction. 47 Va. App. 55, 622 S.E.2d 253 (2005). The Virginia Supreme Court then held unanimously, seven votes to none, that the evidence should have been suppressed as unconstitutionally obtained. 272 Va. 717, 636 S.E.2d 395 (2006).

SUMMARY OF ARGUMENT

An arrest for an offense Virginia state law declares not to be arrestable is an unreasonable seizure within the meaning of the Fourth Amendment. The Court has often looked to a state's law of arrest in Fourth Amendment decisions, and has never held that state law defining arrestable offenses may be ignored.

Looking to state law as a baseline to decide whether an arrest is reasonable under the Fourth

Amendment is, moreover, consistent with the approach the Court has taken in interpreting many other constitutional guarantees. For example, in the procedural due process area, the Court looks to state law as a primary source of entitlements. If the Court concludes that state law has created an entitlement, it then employs the Due Process Clause to decide, as a matter of federal constitutional law, what protections should attach to that entitlement. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). The same two-step analysis, starting with a policy decision made by state law and ending by putting the procedural consequences of that decision beyond the state's reach, also applies to Fifth Amendment Double Jeopardy and Takings claims, Sixth Amendment claims about the scope of the right to counsel and right to jury trial, Due Process claims regarding the liberty of prisoners, and even the First Amendment's public forum doctrine.

The Court has already decided that the Fourth Amendment allows a state to authorize arrest for even minor offenses. *See Atwater, supra.* But when, as here, a state has made the opposite choice, the Fourth Amendment should be construed to enforce that policy choice by declaring the arrest constitutionally unreasonable. Otherwise, the police have in effect been given a constitutional *carte blanche* to engage in lawless, arbitrary, and discriminatory arrests.

Probable cause is a necessary ingredient of a constitutional arrest under the Fourth Amendment but it is not a sufficient safeguard when the state itself has concluded that arrest is an excessive response to particular offenses. Nor does the

Virginia Constitution provide an adequate safeguard in this case since its relevant provisions have been deemed co-extensive with the Fourth Amendment.

The Court is not being asked to impose a limitation on Virginia's officers that Virginia would find objectionable. To the contrary, the Court is merely being asked to help Virginia enforce the constitutional consequences of its own policy decisions.

ARGUMENT

I. A SEARCH INCIDENT TO AN ARREST THAT IS UNLAWFUL UNDER APPLICABLE STATE LAW IS NOT A REASONABLE SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. A State's Law Of Arrest Provides A Baseline For Determining When An Arrest Is Reasonable Within The Meaning Of The Fourth Amendment.

The idea that a state's law of arrest provides a baseline for Fourth Amendment interpretation is not new. The Court has often stated that the question of whether a search incident to arrest is constitutional can only be answered by looking to the particular requirements of state law.

> The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it

> could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty.
>
> Note 5: This is the Washington law. State law determines the validity of arrests without warrant. *United States v. Di Re*, 332 U.S. 581.

Johnson v. United States, 333 U.S. 10, 15 & n. 5 (1948)(citations omitted).

In *Ker v. California*, 374 U.S. 23 (1963), the Court confronted the question of whether a state officer's warrantless search of Ker's apartment was justifiable under the Fourth Amendment as a search incident to a "lawful arrest." To answer this question, the Court first determined that probable cause existed, and then looked to state law to flesh out the definition of what constituted a reasonable arrest:

> This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. *Miller v. United States*, [357 U.S. 301 (1958)]; *United States v. Di Re*, 332 U.S. 581 (1948); *Johnson v. United States*, 333 U.S. 10, 15, n. 5 (1948). A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law.

Ker, 374 U.S. at 37.[4]

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[4] *Ker* assumed that federal arrests would also be judged by the standards of state law because in *United States v. Di Re*, 332

The Court explained its focus on state law by observing that *Mapp v. Ohio*, 367 U.S. 643 (1961), had not

> precluded [the states] from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones v. United States*, 362 U.S. 257 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees

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U.S. 581, 588-95 (1948), the Court had asked whether the arrest in that case, by a state officer for a federal offense, was consistent with the law of the state. "[I]n absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. Deciding that an arrest for a federal offense is invalid because it violates the law of the state where it took place would indeed create a problem of lack of uniformity. That aspect of *Di Re* has become outdated. Congress has nationalized the law of arrest for federal officers. No such non-uniformity problem exists in applying the law of each state only to its own officers.

The *Di Re* Court also noted that the tradition of deferring to state laws governing arrest was one of long standing: "By one of the earliest acts of Congress [Act of September 24, 1789 (Ch. 20, § 33, 1 Stat. 91), the principle of which is still retained, the arrest by judicial process for a federal offense must be 'agreeably to the usual mode of process against offenders in such state.'" 332 U.S. at 589.

> but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.

Ker, 374 U.S. at 34.[5] The Court went on to hold that the arrest in that case was consistent with both state and federal law.

Similarly, in *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) the Court held that no exigent circumstances existed to excuse obtaining a warrant before conducting a home arrest for an offense defined by state law as minor:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. See Wis. Stat. § 346.65(2) (1975); § 346.65(2)(a) (Supp. 1983-1984). . . . This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest.

See also Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 187 (2004) (arrest for refusal to provide name did not violate the Fourth Amendment because the source of the obligation was state law).

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[5] Justice Brennan, in dissent, argued that the method of entry in *Ker* should have been considered unreasonable under the Fourth Amendment even if it was permissible under state law, a position the Court ultimately adopted in *Wilson v. Arkansas*, 514 U.S. 927 (1995). *Ker*, 374 U.S. at 46-62. Brennan also questioned the plurality's conclusion that state law had not actually been violated, *id.* at 62-63. But he did not disagree that the state law should provide at least a floor for protection against unreasonable arrests.

In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court considered whether to interpret the Fourth Amendment itself as rendering arrests for minor offenses unreasonable. The Court decided not to get into the business of formulating nationalized limitations to govern local law enforcement. *Id.* at 347. The Court did express concern that the arrest of Gail Atwater, a law-abiding citizen whose only offense was a failure to use seat belts, seemed unnecessary and rather arbitrary, *id.* at 346 ("[i]f we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail"), but concluded that it was best to allow the states to structure their own laws of arrest to preclude custodial arrest for minor offenses if they wished to do so, *id.* at 351-53.

The Texas law at issue in *Atwater* clearly authorized arrest for all violations of the traffic code. *Id.* at 323. The Virginia legislature just as clearly did not. The Court in this case is not being asked to override a decision resting in local policy considerations and conditions, but to respect the state's own choice.[6]

Petitioner and the United States both cite dicta from some cases remarking that probable cause is sufficient to make an arrest reasonable, *see* Petitioner's Brief at 14-15, United States Brief at 7-9.

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[6] The ACLU argued in *Atwater* that the Fourth Amendment itself bars arrest for minor offenses regardless of what state law may authorize. *See* Brief *Amicus Curiae* of the ACLU, *et. al.*, Supporting Petitioner in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2000)(No. 99-1408). We continue to believe that *Atwater* was wrongly decided, although we are not pressing that argument here.

In no case they cite did the Court conclude that an arrest was constitutionally valid despite being invalid under state law.[7]

Fourth Amendment law will never yield consistent results throughout the states because, at an absolute minimum, the Fourth Amendment requires that an arrest be based on probable cause to believe that an offense has been or is being committed. *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003). State legislatures decide how to define offenses; federal constitutional law then superimposes the probable cause requirement as one aspect of what is necessary to render an arrest "reasonable."

This reliance on state law has not posed any problems. Because officers in each state refer to their own unique state law in deciding when an arrest is permissible, there is no likelihood of confusion. Similarly, reviewing courts have not had any difficulty looking to state law to determine whether probable cause existed to believe that a

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[7] In *Cooper v. California*, 386 U.S. 58, 61 (1967) and in *Elkins v. United States*, 364 U.S. 206, 223-24 (1960), the Court held that an otherwise unconstitutional arrest did not become constitutional because a state law purported to authorize it. Although a state may add to the Fourth Amendment requirements, it obviously cannot reduce those requirements. In *Whren v. United States*, 517 U.S. 806 (1996), the question was whether a traffic stop the D.C. Code defined as permissible became unconstitutional because the officer conducting the stop was not wearing a uniform. *Id.* at 815. The D.C. Code had not declared that stops or even arrests for such traffic offenses were unreasonable; it only sought to regulate the relative jurisdiction of plainclothes officers.

state offense was actually being committed. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146 (2004) (providing an example of how careful review of state law is necessary to determine the validity of an arrest).

The Fourth Amendment does not permit officers to disregard the elements of a criminal offense as defined by their own state laws when making an arrest. If an officer does arrest someone without having probable cause to believe that an actual offense was committed, the appropriate sanction (including the exclusion of evidence) is determined under the federal Constitution. There is no reason why the result should be any different when officers disregard their state law on the related issue of whether an arrest for the defined offense is authorized. [8]

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[8] Petitioner's parade of horribles raises the specter of federal courts suppressing evidence because an officer has failed to follow a technical state law requiring the wearing of a badge or imposing a geographical limitation on jurisdiction. Petitioner's brief at 40-43. The discussion of *Whren, supra*, suggests that the Court will have no difficulty in finding arrests reasonable where state law regulates what an arresting officer should wear, as opposed to embodying a fundamental decision about whether or not any given offense is arrestable. The chief case petitioner cites as an example of the federal courts' alleged inability to distinguish between trivial and non-trivial state laws, *Sandin v. Conner*, 515 U.S. 472 (1995), is actually an example of the Court distinguishing the "atypical and significant" deprivations of liberty a prisoner experiences from de minimis deprivations.

B. Relying On State Law To Determine When An Arrest Is Reasonable Is Consistent With The Interpretation of Many Other Bill Of Rights Guarantees.

There is nothing unique or surprising about recognizing that the reasonableness of an arrest under the Fourth Amendment turns in part on state law. To the contrary, the scope of many of the procedural protections provided by the Bill of Rights varies from state to state depending on the unique context of each state's law. It is consistent with interpretations of rights under the First, Fifth, Sixth, and Fourteenth Amendments to treat state law as providing a baseline for determining when an arrest is reasonable, and then to treat federal law as determining the procedural consequences of each state's choice.

The classic example of this two-step interpretive approach is procedural due process doctrine. In *Board of Regents v. Roth*, 408 U.S. at 576-78, the Court explained that plaintiff Roth had no right to a hearing or any other form of due process in connection with losing his job at a state university unless he was deprived of liberty or property within the meaning of the Due Process Clause. The Court held that the first step to take in answering that question was to look at state law. If state law limited the state's discretion to fire Roth, Roth would be deprived of a state-created entitlement by that decision and hence would fall within the ambit of the Due Process Clause. What process he was due would then be decided as a matter of federal constitutional law. *See Cleveland Bd. of Educ. v.*

Loudermill, 470 U.S. 532, 538-41 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Justices Brennan and Marshall had argued that the Court should shoulder the burden of deciding what values the Due Process Clause protects, and should therefore require that any state decision inflicting a "grievous loss" on an individual be tested against federal procedural norms of due process. *See Roth*, 408 U.S. at 587-92 (Marshall, J., dissenting); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Brennan, J.). Other Justices had advocated a due process balancing test that also would have involved the Court in judicial decision-making about the values due process should protect. *See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 161-63 (1951) (Frankfurter, J., concurring).

The *Roth* Court rejected those approaches. But it also rejected the idea that the states should be left to decide what process is necessary to protect those rights the state itself has acknowledged. Then-Justice Rehnquist, for example, maintained that state legislatures should retain the prerogative to decide for themselves what sort of procedure should attach to any particular decision because the states may choose whether to create an entitlement in the first place. *Arnett* v. *Kennedy*, 416 U.S. 134, 151-55 (1974). Instead of adopting the Rehnquist "bitter with the sweet" theory, the Court adopted a hybrid rights approach, splitting the decisions about how rights are created and protected. Once state policy makers have made the threshold decision that an entitlement deserves respect, the Due Process Clause then requires the state to follow through on its own normative judgments by providing procedures

sufficient to meet the standards set by federal constitutional law. *Mathews, supra.*

Although this hybrid rights approach is best known in the procedural due process context, the Court has adopted the same technique in many other contexts to decide when constitutional protections apply. The Fifth Amendment's Double Jeopardy Clause, for example, prohibits being put twice in jeopardy for the same "offense," but protection against multiple prosecutions hinges on each legislature's definition of what constitutes an "offense." Under *Blockburger v. United States,* 284 U.S. 299, 304 (1932), two offenses are not the "same" if each is defined as requiring proof of a fact the other does not. It is up to the legislature to decide how to define its offenses. Thus, here too, state law provides the trigger for the constitutional right, but then must yield to the consequences required by the federal constitutional provision being interpreted.

The Fifth Amendment Takings Clause, providing that private "property" may not be taken for public use without just compensation, likewise relies on state law to determine what constitutes "property" entitled to constitutional protection. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'"(quoting *Roth*, 408 U.S. at 577); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164-65 (1980) (following the *Roth* approach in deciding that the interest in question was a form of property). *See* Thomas W.

Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886-88, 934-42 (2000).

Sixth Amendment rights are contingent on state legislative policy decisions, as well. Decisions regarding the temporal and substantive scope of the Sixth Amendment right to counsel also look to state law. The right to counsel attaches once formal judicial proceedings have begun, and the Court has historically treated state law as a minimum baseline in making that decision. The point at which the police must notify counsel of a lineup, *see Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Moore v. Illinois*, 434 U.S. 220 (1977), or must stop trying to elicit incriminating information in the absence of counsel, *see Massiah v. United States*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387, 398 (1977), therefore can vary from state to state.[9]

Whether the Sixth Amendment provides a right to assigned counsel also depends on decisions made by the state. Any legislature can choose to avoid the provision of assigned counsel altogether by making a particular offense punishable only by fine, or to create the conditions under which an indigent defendant will be entitled to assigned counsel by

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[9] *Rothgery v. Gillespie County*, 491 F.3d 293 (5th Cir. 2007), *cert. granted*, 07-440 (Dec. 3, 2007), raises the question of whether the Sixth Amendment poses an additional limitation on the state's ability to define when the right to counsel begins. No matter what the Court decides in *Rothgery*, it will still be true that the state law establishes a minimum baseline of protection. Sometimes, as in the Fourth Amendment area, the Court concludes that the state's minimum is not sufficient -- a state may not, for example, decide to create a law of arrest eliminating the probable cause requirement.

providing for punishment by incarceration. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972). The Sixth Amendment right to counsel only requires the state to spend money on provision of defense counsel if the state has chosen to impose a punishment so serious that the provision of counsel is deemed too important to leave to the vagaries of state politics.

Similarly, the Sixth Amendment right to trial by jury springs into being only if the jurisdiction's legislature has decided that the offense in question should be punishable by incarceration of six months or more. *See Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). In all of these contexts, state autonomy is respected, but not to the extent of eviscerating the Constitution's procedural protections.

The Court has also employed this two-step approach in defining the "liberty" entitlements of prisoners and others. *See Meachum v. Fano*, 427 U.S. 215 (1976).[10] Inmates seeking parole in New York, for example, may not have a right to a parole hearing, *see Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979), while inmates in Nebraska will (*see Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12 (1979). That difference in constitutional protection is entirely due to the fact that New York policy makers have made different

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[10] For a fuller explanation of the theoretical basis for the hybrid rights approach in the procedural due process area, *see* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U.L. REV. 482, 543-54 (1984).

decisions than Nebraska's, and those decisions shape a prisoner's legitimate expectation of release.[11]

Recognizing that a state's decision about what constitutes an arrestable offense can have Fourth Amendment consequences is consistent with this broader jurisprudence. Justices Brennan and Marshall had argued that defining the scope of the Fourth Amendment should require the Court to identify the norms and values the Amendment serves, *see Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting); *United States v. Miller*, 425 U.S. 435, 448, 451 (1976) (Brennan. J., dissenting). That task, which the Court disavowed in *Atwater*, is comparable to deciding what constitutes a "grievous loss," the approach Brennan and Marshall had advocated in the due process area. But despite the lessons of the procedural due process cases, petitioner invites the Court to go to the other extreme and simply leave it to the states to decide whether the search incident to arrest doctrine should

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[11] Even in the First Amendment area, the Court has on occasion used a two-stage inquiry to set levels of constitutional protection contingent upon state policymakers' decisions. *See, e.g., Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), where the Court explained that it first looks to see whether or not "by long tradition or by government fiat" a place has become a public forum devoted to assembly and debate. Only after answering that question does the Court decide what type of First Amendment protections to afford speakers in that place. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1805-24 (1987) (discussing whether the public forum doctrine should ideally make constitutional principles rest on social practices or vice versa).

apply to officers who use the arrest power at their own whim, even if in flagrant defiance of state law, or to restrict Fourth Amendment analysis to asking at most the minimal question of whether probable cause existed. Petitioner's Brief at 19. This Court should reject that approach here, just as it did in the procedural due process cases.[12]

Petitioner paints a dire picture of befuddled federal courts grappling with the complexities and confusion of state law, or taking on the role of instructing state officials on the meaning of their own law. Petitioner's Brief at 20. What petitioner describes as a uniquely daunting inquiry, however, is in reality routine in numerous constitutional contexts. Petitioner further assumes that whoever creates a right should also have the final decision about the procedures and remedies surrounding that right. *Id.* at 20-26. That assumption, like the firmly rejected "bitter with the sweet" approach of *Arnett v. Kennedy, supra*, is not an accurate reflection of the Supreme Court's constitutional law in any of the areas of constitutional procedure described above. A state may no more decide to authorize successive trials for two identical offenses it has created than it may truncate due process protections attaching to a state-created entitlement.

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[12] The due process cases reject any notion that the Court should minimize its role in deciding what process is due by, for example, setting aside state procedural decisions only if they are shocking to the conscience. Deciding that an arrest is reasonable simply because it is based on probable cause would limit the scope of the Fourth Amendment in a similarly inappropriate fashion.

In this case, Virginia decided not to confer upon its officers discretionary arrest power constrained only by the probable cause requirement. Virginia's decision to define what happened to David Moore in this case as an unreasonable search and seizure triggers Fourth Amendment protections, just as a state's decision to create an entitlement triggers due process protections.

Respondent makes much of the fact that the Court has previously held that state laws do not always generate expectations of privacy under the Fourth Amendment. Petitioner's Brief at 18. *California v. Greenwood*, 486 U.S. 35 (1988), the principal case on which petitioner relies for this proposition, is readily distinguishable. The state law at issue in *Greenwood* was a state constitutional right of privacy applicable to the general public, not a law circumscribing the authority of state law enforcement officers. The Supreme Court concluded that the California courts did not create a "search" within the meaning of the Fourth Amendment by holding that individuals have a state constitutional right of privacy in their trash. *Id.* at 43-44. The Court has always held that whether or not something is a "search" within the meaning of the Fourth Amendment depends on nationwide "societal expectations," under the *Katz* test. *Katz v. United States*, 389 U.S. 347 (1967). The Virginia statute in this case, by way of contrast, addresses what is already clearly a Fourth Amendment seizure – an arrest – and a Fourth Amendment search of a person and a home. As the cases in the previous section demonstrate, the Court has historically embraced the idea that a determination of when an arrest is

reasonable, reflected in the state law of arrest, is to be treated differently from the question of whether the Fourth Amendment applies at all.

II. ABSENT A STATE LAW LIMITATION, CURRENT FOURTH AMENDMENT LAW CREATES INCENTIVES FOR UNLAWFUL ARRESTS AND UNJUSTIFIED SEARCHES WITHOUT IMPOSING COUNTERVAILING LIMITS

Because current Fourth Amendment doctrine makes custodial arrest the necessary predicate for an automatic warrantless search, *see Knowles v. Iowa*, 525 U.S. 113 (1998) (declaring a search incident to arrest impermissible if a citation is issued), officers are invited to defy their state law of arrest if they wish to conduct a search but have no probable cause to justify that search and no lawful authority to arrest. Beyond reliance on state law, current constitutional doctrine imposes no limitation on an officer's discretion to arrest except for the existence of probable cause to believe that an offense, no matter how trivial, has been committed. The Court has created a number of bright line rules, each initially designed to address an exigency, which in combination have created a vast power to conduct searches without either a warrant or probable cause to search. If the state law of arrest does not provide some limit to that discretion beyond the minimal probable cause for arrest requirement, there will be no meaningful limit.

A. The Search Incident to Arrest Doctrine Invites Warrantless Searches Even Where No Exigency Exists.

Robinson v. California, 414 U.S. 218, 235 (1973), correctly observed that searches incident to arrest are sometimes justified by exigency – either to protect the arresting office or to prevent concealment or destruction of evidence. Responding to the need to conduct a warrantless search in some cases, the Court conferred a broad power to search incident to arrest in all cases, even in circumstances where there is little likelihood of danger and no likelihood that evidence will be concealed or destroyed. *Robinson* ruled that authority to search an arrestee's person can be exercised even where an offense, like a traffic offense, does not generate any prospect that evidence might exist. *New York v. Belton*, 453 U.S. 454 (1981), then expanded the search incident to arrest authority respecting vehicles, affording a broad bright line authority to conduct warrantless searches of vehicles in the absence of probable cause to search, even in circumstances where an individual is in handcuffs and removed from the vicinity of the vehicle and thus poses no danger. *Thornton v. United States*, 541 U.S. 615 (2004), further expanded this automatic search authority to situations where the person arrested was not even in the car at the time of arrest.

It is no wonder that Justice Scalia, in *Thornton*, urged the Court to return to the principle that if officers wish to search the car of a person who has been arrested, in circumstances where no actual exigency exists, they should be required to demonstrate probable cause to believe that evidence

might be found. "The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging," *id.* at 630 (emphasis in original), but "[i]n the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling." *Id.* at 632.

The search incident to arrest in this case is virtually indistinguishable from general rummaging. Moore committed the traffic offense of driving with a suspended license. His infraction generated no prospect of finding evidence of the crime for which he was arrested, and did not seem to lead the officers, who forgot to search him at the scene of the arrest, to believe that he was dangerous. Moore's commission of this traffic offense could not, under *Knowles, supra*, have led to an incident search if the officers had obeyed their state law and issued a summons. Petitioner argues that *Knowles* is distinguishable because an arrest took place here, despite the fact that the arrest was illegal. Allowing officers to get around *Knowles* so easily would ratify the "prerogative"[13] the officers in this case claimed -- to bootstrap their way into what would have been an overbroad search power in any event. There is no reason to allow officers who conduct illegal arrests to take advantage of their own misconduct by conducting searches that, even if the arrest had been legal, would not have addressed an actual exigency. The cynicism and illegality of the officers' conduct here highlights the need for some meaningful

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[13] See *Moore v. Commonwealth*, 47 Va. App. 55, 60, 622 S.E.2d 253, 256 (Ct. App. 2005) (*en banc*).

implementation of the Fourth Amendment's central purpose of constraining arbitrary or discriminatory arrests and searches.

Just last Term, the Court unanimously decided that a passenger is "seized" within the meaning of the Fourth Amendment when the car in which the passenger is traveling is stopped. *Brendlin v. California*, 127 S. Ct. 2400 (2007). The state conceded that the officers in question had violated state law by stopping the car in which Brendlin was traveling. *Id.* at 2404 n.2. In its opinion, the Court recognized the importance of interpreting the Fourth Amendment in a manner that avoids creating perverse incentives for overly zealous officers, remarking that a contrary rule would invite officers to stop cars illegally. *Id.* at 2410. The same concern applies with equal force here.

B. The Lack Of Either Subjective Or Objective Limitations On The Arrest Power Invites Unreasonable Arrests And Searches.

The Court has already rejected two of three possibilities for limitations on the arrest power, either of which would have had the effect of circumscribing the search incident to arrest authority in circumstances where no exigency exists. In *Whren, supra*, the Court declined to hold that officers act unreasonably if they use enforcement of minor traffic laws as a pretext to conduct a search they could not otherwise have conducted. After rejecting the idea that the Fourth Amendment might impose some subjective limitation on an officer's power to arrest, the Court went on to reject the

imposition of an objective limitation as well. In *Atwater, supra,* the Court ruled that an arrest for a minor, fine-only offense is not inherently unreasonable within the meaning of the Fourth Amendment, freeing officers to conduct arrests in a vast array of circumstances and then conduct warrantless searches incident to arrest.[14]

The combined effect of the unlimited bright line rules the Court has created in this series of cases has substantially diluted core Fourth Amendment safeguards:

> "I[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." I entirely agree with that assessment.

Thornton, 541 U.S. at 628-29 (Scalia, J., concurring) (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring). The Court has reached this unfortunate position by piling bright line rules on each other without attending to the combined effect of those rules. *See* Donald A. Dripps, *The Fourth Amendment and the Fallacy of*

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[14] The decision in *Atwater* has been criticized as affording too much unconstrained discretion to arrest. *See, e.g.*, 3 Wayne R. LaFave, SEARCH & SEIZURE 5.1 (Supp. 2004); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORD. L. REV. 329 (2002).

Composition: Determinacy versus Legitimacy in a Regime of Bright-Line Rules, 74 MISS. L.J. 341, 392-404 (2004). Dripps describes *Whren*, *Atwater*, and *Belton* as together creating an "iron triangle" where police can arrest and search at whim. *Id.* at 392-404.

The facts here show how easily officers can maneuver within the "iron triangle" and how they can capitalize on a pretextual arrest in order to search not only the person arrested and his vehicle, but even the person's home, by inveigling consent to search -- all without either probable cause to search or a warrant. Petitioner defends the "constitutional propriety" of the illegal arrest and unjustified search in this case, *see* Petitioner's Brief at 10, on the ground that they happen to fall within the iron triangle. As Justice Scalia noted in *Thornton*, 541 U.S. at 627, however, such a search "is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the search unlawful." Justice Scalia, like the unanimous Court in *Brendlin*, *supra*, recognized the continuing truth of an earlier observation by Justice Robert Jackson: "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (dissenting).

III. RELYING ON STATE LAW TO DEFINE WHEN AN ARREST IS REASONABLE FOR FOURTH AMENDMENT PURPOSES IS NECESSARY TO PREVENT ARBITRARY AND DISCRIMINATORY ARRESTS AND INCIDENT SEARCHES

This case demonstrates how easy it is for an officer to subvert both state law and the warrant requirement in order to rummage for drugs. The expansive search incident to arrest authority has become the modern equivalent of the general warrant, allowing the police to search at will. *See Entick v. Carrington*, 19 How. St. Tr. 1029, 1031, 1063-744 (C.P. 1765) (disapproving a search of plaintiff's private papers under a general warrant, despite the arrest of the plaintiff). This situation surely would have horrified the framers of the Fourth Amendment.

> [The framers] did not perceive the warrantless officer as being capable of posing a significant threat to the security of person or house. That was because the ex officio authority of the peace officer was still meager in 1789. Warrant authority was the potent source of arrest and search authority. As a result, the Framers expected that warrants would be used.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999). "[T]he common law did not provide officers with discretionary search and seizure authority." *Id.* at 619.

A. Encouraging Officers To Ignore Limitations Imposed By Their State Law Of Arrest Invites Arbitrary, Discriminatory, And Ineffective Law Enforcement.

What could be more arbitrary than an arrest prohibited by state law? If the Fourth Amendment endorses any arrest based on probable cause, regardless of the arrest's illegality under state law, officers will have almost boundless discretion to decide whom to arrest and therefore search. The facts in this case demonstrate that some officers will disregard state law in exercising that discretion. The Court in *Brendlin*, *supra*, also confronted officers who were willing to violate state law in order to stop a car, and recognized that it would be a mistake to interpret the Fourth Amendment in a manner that condones or invites such illegal conduct. 127 S.Ct. at 2410.

If officers can arrest and search almost on whim, some officers will inevitably use that authority to conduct arbitrary arrests, or to discriminate on the basis of race or some other impermissible factor. There are, unfortunately, many cases showcasing officers who were willing to take advantage of this license to perform what seem to have been arbitrary and possibly discriminatory arrests. *See, e.g., Fisher v. Washington Met. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982) (arrest for eating on the subway); *Thomas v. Florida*, 614 So.2d 468 (Fla. 1993) (arrest for failure to have a bell or gong on one's bicycle); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999) (arrest for littering); *Barnett v.*

United States, 525 A.2d 197 (D.C. Ct. App. 1987) (arrest for "walking as to create a hazard").

The probable cause requirement is a negligible hurdle and an inadequate deterrent to arrests prohibited by state law. Petitioner prominently cites Fourth Amendment authority Wayne LaFave for the proposition that nothing more than probable cause is required for an arrest to be reasonable. Petitioner's Brief at 29. In the section cited, however, LaFave was merely reporting the Court's dicta.[15] Expressing his own view elsewhere, LaFave has forcefully argued that probable cause should not be the only Fourth Amendment requirement for arrest because it does not provide sufficient guidance to officers. "[P]robable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action," Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1854 (2004). *See also id.* at 1852-53. If probable cause is the only prerequisite to arrest, virtually anyone who drives can be stopped (for changing lanes without signaling, exceeding the speed limit, etc.). Pedestrians can be arrested for jaywalking, mass transportation riders for eating or

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[15] The Court has also frequently said that an arrest not complying with the state law of arrest would be invalid. *See Johnson, supra* (noncompliance with presence requirement); *Ker, supra* (noncompliance with knock and arrest requirement). The Court's recent dicta to the opposite effect have not been the basis for holdings, and so the question petitioner describes as resolved is in fact being squarely presented to the Court for the first time.

putting a package on the seat, and cyclists for failing to have a "bell or gong" on their bicycle, all so that officers can rummage for drugs. The cases above describing people who have actually been arrested and even searched for such trivial offenses, *see, e.g.*, . *Thomas v. Florida, supra,* show that probable cause is indeed a very low bar.

The *Atwater* decision declined to raise that bar because the Court thought that arbitrary arrests were unlikely to occur very often. The Court reached that conclusion by speculating that officers would not want to waste resources and time by taking people into custody unnecessarily. *Atwater,* 532 U.S. at 352. These pragmatic considerations do not, however, prevent an officer from conducting an arbitrary arrest in order to search and then simply releasing the individual or issuing a summons if the search comes up empty. Arbitrary custodial arrests, as happened to Gail Atwater, may be rarer than arbitrary or discriminatory searches incident to arrest.

Substantial empirical evidence also strongly suggests that allowing virtually unconstrained police discretion to decide whom to arrest and search may disproportionately affect minorities. In a national survey published in 2006, the United States Department of Justice found that African-Americans were nearly three times as likely and Hispanics more than twice as likely as white motorists to be physically searched or to have their vehicles searched when their cars were stopped.[16] *See also* 1

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[16] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 2002 5 (2006), available at http://www.ojp.usdoj/bjs/pub/pdf/cdsp02.pdf.

Wayne R. LaFave, SEARCH & SEIZURE 1.4 n. 77.36 (Supp. 2004). *Amici* do not have data showing how extensive a problem this might be within the state of Virginia because the Virginia legislature has repeatedly voted down bills that would have mandated collecting statistics on racial profiling.[17] It is clear, however, that "[f]ishing for drug couriers in the immense stream of cars on interstate highways is a hopeless strategy for eliminating drug trafficking; it probably has no impact whatsoever on drug markets." Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1431 (2002). Furthermore, studies consistently find that there is no difference in "hit rates" – contraband discovery rates – when officers use their discretion to search in a racially disparate manner.[18] Thus, there is little benefit to law enforcement gained by allowing state officers to evade the limitations of their state law of arrest.

B. Virginia's State Constitution Does Not Provide Any Independent Limit On Police Discretion To Arrest.

State constitutional law does not provide an adequate alternative to Fourth Amendment protection. In *California v. Greenwood*, 486 U.S. at

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African Americans were searched during 10.2 % of stops; Hispanics 11.4%, and whites 3.5%.

[17] *See* RACIAL PROFILING DATA COLLECTION RESOURCE CENTER AT NORTHEASTERN UNIVERSITY, http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php?state=VA (describing the failure of four bills, HB 157 (2006), HB 2735 (2005), SB 225 (2004), and SB 280 (2002)).

[18] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 16, at 6.

43-44, after declining to find a government investigation to be a search within the meaning of the Fourth Amendment, the Court suggested that individual states could use their own constitutions to impose more stringent constraints on their state police. This case provides a striking example of how readily the Fourth Amendment's floor can become its ceiling.[19]

The Virginia Constitution does not contain a provision like the Fourth Amendment, prohibiting unreasonable searches and seizures. The Virginia Constitution only provides: "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted." VIRGINIA CONSTITUTION, article I, § 10. The framers of the Virginia Constitution evidently did not foresee a world in which exceptions to the warrant

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[19] In *Whren*, the Court suggested the possibility of an equal protection challenge to address discriminatory searches or seizures. 517 U.S. at 813. That possibility has turned out to be more theoretical than real. A plaintiff cannot successfully challenge a pattern of discriminatory arrests under the Equal Protection Clause without meeting the very demanding burden of proving intentional racial discrimination. For this reason, equal protection challenges will "almost always fail." David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326; *see also* LaFave, *The "Routine Traffic Stop,"* 102 MICH. L. REV. at 1860-61. For a dramatic example of how easily a plaintiff's discrimination claim can be dismissed despite substantial evidence of discriminatory enforcement, *see Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001).

requirement would proliferate. They acted against a background where law severely limited warrantless arrest and search authority and so they tried to constrain legislatures from using general warrants to authorize conduct that would not otherwise have been acceptable, on the assumption that the common law would prevent arbitrary warrantless searches and seizures. *See* Davies, *supra,* at 619-24.

Under the duress of this constitutional language and history, the Virginia courts have ruled that state constitutional protections against unreasonable searches and seizures "are substantially the same as those contained in the Fourth Amendment." *Lowe v. Commonwealth*, 230 Va. 346, 348 n.1, 337 S.E.2d 273, 274 (1985)(quoting I A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 182 (1974)). Thus, if the Virginia state legislature provides limitations on arrest but stops short of providing any meaningful enforcement of those limits, the Virginia courts cannot choose to exclude evidence under their state Constitution. The only Constitution that can be brought to bear on what the Virginia Supreme Court obviously viewed as a serious problem is the United States Constitution.

The Virginia state legislature and all of the Justices of the state's highest court agree that the arrest in this case was unreasonable. The Virginia legislature was willing to provide more constraints on the state police than the federal Constitution requires, but stopped short of providing a remedy to make those constraints effectual – just as state law might provide employees with entitlements to their jobs but not to any meaningful procedures to protect

those entitlements. The framers of the Fourth Amendment were concerned that legislatures would authorize general warrants. They would not have been relieved to learn that a legislature might go halfway, imposing a constraint on the ability of peace officers to conduct arbitrary warrantless searches and seizures, but leaving that prohibition toothless.

This Court uses the exclusionary rule, albeit reluctantly, where its use is necessary to enforce constitutional guarantees. *Hudson v. Michigan*, 547 U.S. 586 (2006); *Mapp v. Ohio, supra*. In this case, those guarantees must be derived from state law and must then be enforced by the Fourth Amendment, or there will be no meaningful limits on warrantless arrests or searches in the state of Virginia. All of the members of the Virginia Supreme Court, who are fully familiar with whatever alternative enforcement opportunities exist under Virginia law, believed that the exclusionary rule is necessary in this case. They are right.

CONCLUSION

For the reasons stated above, the judgment of the Virginia Supreme Court should be affirmed.

Respectfully submitted,

Susan N. Herman
Counsel of Record
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7945

Steven R. Shapiro
Emily Chiang
American Civil Liberties
Union Foundation
125 Broad Street
New York, N.Y. 10025
(212) 549-2500

Rebecca Glenberg
ACLU of Virginia Fdn.
530 E. Main St., Ste 310
Richmond, VA 23219
(804) 644-8022

Dated: December 10, 2007

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No. 06-1082

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

WILLIAM H. NEUKOM
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000

OF COUNSEL:
PROF. RORY K. LITTLE
PETER J. DROBAC
JEFFREY W. MIKONI

Attorneys for Amicus Curiae American Bar Association

December 10, 2007

BEST AVAILABLE COPY

QUESTION PRESENTED

The Virginia statute underlying this case is modeled directly on ABA Pretrial Release Standard 10-2.2, which requires citation and release rather than arrest for minor offenses, absent grounds that reasonably support danger or a likelihood of non-appearance. *See* American Bar Association, *Criminal Justice Standards, Pretrial Release* (ABA 3d ed. 2007), at 65–66, App. 5–6 (Standard 10-2.2). The ABA therefore submits this *amicus* brief to address the following question:

Whether it is unreasonable to arrest a person when there is probable cause to believe that a minor offense has been committed, but state law prohibits an arrest for that offense unless there are circumstances that would reasonably support arrest (such as danger or likelihood of non-appearance)?

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INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief in support of the position that a statutory requirement of citation and release, rather than arrest, for minor offenses, represents a realistic and balanced policy that is consonant with the longstanding consensus view of the ABA and many state and local jurisdictions. The ABA Pretrial Release Standards setting forth this policy have—for four decades—represented reasonable standards upon which this Court may rely in addressing the constitutional question.

The American Bar Association ("ABA") is the world's largest voluntary professional membership organization, and the leading association of legal professionals in the United States. The ABA's membership of over 413,000 attorneys spans all 50 States and other jurisdictions, and encompasses lawyers from every aspect of the profession, including prosecutors, public defenders, private attorneys, legislators and academicians. The ABA also receives participation from judges, law enforcement and correc-

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

tions personnel, and law students, as "associate" members.[2]

The ABA has long been dedicated to promoting a fair and balanced system of justice, including criminal justice. Its mission is to serve the public and the profession by promoting justice, professional excellence, and respect for the law. Among the ABA's Goals are "to promote improvements in the American system of justice" and "to provide ongoing leadership in improving the law to serve the changing needs of society."[3]

The ABA devotes substantial resources and energy from its members and associates to develop policies that speak to current legal issues. It approves such policies only after significant study, discussion, and review. Drafts of ABA policies routinely go through many revisions, over many months, to reflect the presentation of views from all segments of the ABA's diverse membership. Further, before adoption, the ABA circulates its draft policies widely among the public and other groups that may have a special interest in the subject, and obtains active participation on its Task Forces from such outside

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[2] However, neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] American Bar Association, *ABA Policy and Procedures Handbook, 2007–2008*, at 1 (Goals I & III); http://www.abanet.org/about/goals.html.

organizations (for example, from the U.S. Department of Justice and the National Association of District Attorneys, among others, for criminal law policies).

One of the most prominent efforts of the ABA toward law reform has been its Criminal Justice Standards project. Begun in 1964, under the aegis of then-ABA President (and later Justice) Lewis F. Powell, Jr., the Criminal Justice Standards project has promulgated 20 different topical sets of Standards, over four decades, in every area of criminal justice. As this Court recently recognized, "We long have referred to these ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) and *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal punctuation and quotation marks omitted). Chief Justice Burger wrote in 1974, upon the issuance of the first full edition of the Standards, that "[t]he Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251–252 (1974).

The ABA's Criminal Justice Standards have been influential in every branch and at every level of American law enforcement and government. They have frequently been referred to, and adopted, by courts, legislatures, and executive branch law enforcement agencies. Computer database searches reveal that the Standards have been cited by courts

in every State and federal Circuit in the United States. The Criminal Justice Standards may currently be found in law libraries across the country and on the ABA website at www.abanet.org/crimjust/standards/home.html.

Forty years ago, the ABA published Pretrial Release Standards that support policies of citation and release, rather than arrest, for most minor offenses, unless factors are present that reasonably indicate danger or a likelihood of non-appearance. *See* American Bar Association, *Standards Relating to Pretrial Release* (ABA 1968) (hereinafter "*1968 Pretrial Release Standards*"). The ABA has adhered to these Standards through three substantive reviews and re-adoptions. *See* American Bar Association, *Criminal Justice Standards, Pretrial Release* (ABA 3d ed. 2007) (hereinafter "*2007 Pretrial Release Standards*"), at 63–70, App. 1–13 (Standards 10-2.1 to 10-2.4). These Standards and their Commentary are reproduced in full in the Appendix to this brief, and are also presented in Section I(B), *infra*. The ABA Standards endorsing citation and release rather than full custody arrest, for most minor offenses, represent a realistic and balanced approach to criminal law enforcement that has proven effective over time. The ABA's review of these Standards have confirmed that they are reasonable, both in theory and in the practical experience of the many jurisdictions that have adopted these standards.

Many state and local jurisdictions have followed the ABA's lead in this area. *See* Brief *Amici Curiae* of Texas *et al.*, at 24–26 & n.6 ("many jurisdictions have chosen to limit warrantless misdemeanor ar-

rests"); Debra Whitcomb *et al.*, *Citation Release* (Nat'l Institute of Justice, U.S. Dep't of Justice, Washington, D.C. 1984), at 3 (reporting that, by 1981, all but nine states had adopted some form of citation and release statutes, and that such procedures were in use in at least 45 states).

The Virginia statute that is at issue in this case—requiring citation and release, rather than arrest, for minor offenses—was a direct legislative response to the ABA's 1968 Pretrial Release Standards, in particular Standard 10-2.2. *See* Richard E. Walck *et al.*, *Comparative Analysis of American Bar Association Standards for Criminal Justice with Virginia Laws Rules and Legal Practice* (undated [1974]), at II-3 ("Virginia should consider amending its Code to provide for the issuance of citations in conformity with the [ABA] standard[s]" 2.1 and 2.2). Virginia's statute is in accord with the current ABA Standards as well as those of many other states, and the ABA has an interest in supporting those jurisdictions that have adopted ABA Standards and sought to enforce them. The ABA likewise has an interest in having this Court consider its Pretrial Release Standards in determining what is reasonable in the Fourth Amendment context of this case.

SUMMARY OF ARGUMENT

The ABA Standards on Pretrial Release recommend that States adopt statutes that favor citation and release, rather than arrest, for minor offenses, unless additional factors suggesting danger or a likelihood of non-appearance are present. *2007 Pretrial Release Standards* at 65–66, App. 5–6 (Standard 10-2.2). These Standards have been studied, refined,

and formally adopted by the ABA on four different occasions over the past forty years. They have influenced the statutes and rules adopted in the vast majority of American jurisdictions, including Virginia, that favor citation and release for minor offenses. *See generally* Whitcomb, *Citation Release*, *supra*. Thus the ABA Standards represent a realistic, balanced, and reasonable policy—a consensus view adopted by a wide range of thinkers and law enforcement interests over time—and they have proven to be effective in the field.

This Court has, in other cases, relied on the ABA Standards to determine what is reasonable. *E.g.*, *Rompilla*, *supra*, 545 U.S. at 387 (Sixth Amendment); *Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (citing the Standards and Commentary to evaluate arrest authority). In particular, because the state courts here found no facts to reasonably suggest that an arrest was necessary for this minor offense, and Virginia state law prohibited the arrest, the ABA Standards counsel that the arrest was unreasonable. Moreover, the Commentary to ABA Standard 10-2.4 recognizes that when no reasonable grounds for arrest are present, then "once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view)." *2007 Pretrial Release Standards*, Commentary to Standard 10-2.4, at 70 n.31, App. 13 n.31. Thus the search here, conducted pursuant to an unreasonable arrest, was also unreasonable. The ABA respectfully submits that this Court should consider the consensus views expressed in the Pretrial Release Standards to determine that the Virginia statute reflects a reasonable rule in the

Fourth Amendment context, and for that reason, affirm the judgment of the Virginia Supreme Court.

ARGUMENT

I. The American Bar Association Standards for Pretrial Release, Advocating Citation Rather Than Arrest for Most Minor Offenses, Represent a Realistic, Balanced, and Reasonable Policy.

A. The ABA Criminal Justice Standards Are Developed and Adopted Through a Process That Ensures a Realistic and Balanced Policy Reflecting the Reasonable Consensus of the Law Enforcement Community.

The ABA's Pretrial Release Standards are the tenth chapter in the ABA's overall Criminal Justice Standards project. *See* American Bar Association, *Criminal Justice Section Standards Homepage*, www.abanet.org/crimjust/standards/home.html (linking to all 20 of the ABA's Criminal Justice Standards sets). The Standards represent the consensus views of a wide diversity of legal interests. The final Standards, adopted after many months of study and review, present balanced and realistic guidance regarding reasonable law enforcement practices, toward the ultimate goal of providing an effective yet fair criminal justice system in American society. As explained in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are:

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

American Bar Association, *Standards for Criminal Justice, Prosecution Function and Defense Function* (ABA 3d ed. 1993), at xii.

In 2006, the Chair of the ABA Criminal Justice Standards Committee further described the careful and balanced process by which the Standards are developed. Irwin Schwarz, "Introduction to Criminal Justice Standards," in *The State of Criminal Justice 2006* (ABA 2007), at 69–70:

> The Standards are a valued criminal justice asset largely because of the process through which they are created. Each set of Standards is developed through three levels of drafting and review before it reaches the House of Delegates for final approval as ABA policy. At each of the three levels—Task Force, Standards Committee, and Criminal Justice Section Council—the draft Standards are refined by ABA members who represent the views of the criminal justice community—prosecutors, defense lawyers, judges

> and academicians. The Task Forces, the Standards Committee and the CJS Council are numerically balanced in their composition, by design, to assure that all sectors of the criminal justice community are represented in the process. In addition, each of those entities receives input from liaisons from professional associations such as the National Association of Attorneys General, the National Association of District Attorneys, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defender Association. Development and approval of a set of Standards may require three to six years.

Thus the Criminal Justice Standards, once they are finally adopted by the ABA, represent the careful study and considered thinking of a wide range of legal and law enforcement interests over a significant period of time. They are revised to address the concerns of law enforcement. They strike a reasonable balance between effective law enforcement and the rights of all Americans.

The ABA Standards on Pretrial Release were first promulgated in 1968. *See 1968 Pretrial Release Standards.* A second edition was adopted by the ABA after full reconsideration in 1979, and a Supplemental Edition was adopted, again after careful review, in 1985. *See* American Bar Association, *Standards for Criminal Justice, Pretrial Release* (ABA 2d ed. 1980), at Chapter 10; American Bar Association, *Standards for Criminal Justice, Pretrial Release* (ABA 2d ed. Supp. 1986), at Chapter 10. The

current, third edition of the Pretrial Release Standards was adopted by the ABA, again after a complete review, in 2002, and was then published with Commentary in 2007. *See 2007 Pretrial Release Standards.*

Thus the ABA has studied, reviewed, and adopted Standards on Pretrial Release on four different occasions over the past four decades. Throughout that period, Standard 2.2, recommending citation and release rather than arrest, absent additional factors indicating danger or likelihood of non-appearance, has remained the consistent policy of the ABA. Over time, many jurisdictions have adopted citation and release statutes and rules based on the ABA model. *See* Whitcomb, *Citation Release*, *supra*, at 3 ("As of 1981, all but nine states" had adopted statutes or rules for citation and release; "the procedure is now in use in 45 states"). These procedures have proven to be fair, effective, and cost-efficient over time. *Id.* at vii (reporting one study showing cost savings of almost 100% by the use of field citations rather than arrest). Thus the ABA's reasonable, consensus Standards here have had widespread influence and proven effective in the jurisdictions that have adopted them.

B. The ABA Standards on Pretrial Release Reasonably Require Citation and Release for Most Minor Offenses, Absent Factors Indicating Danger or Likelihood of Non-Appearance.

Before presenting the rationale for the ABA's citation and release Standards (*see infra*, section I(C)),

amicus presents and summarizes the text of the relevant Standards and Commentary here. The full text of Standards 10-2.1 to 10-2.4 is reprinted in the Appendix to this Brief.

First, the ABA Standards on Pretrial Release state a general policy favoring release over detention, pretrial, when consistent with public safety and ensuring that offenders will reappear for the judicial process. Needless detention is disfavored, because it is "harsh and oppressive" as well as expensive for law enforcement:

> **Standard 10-1.1**
> **Purposes of pretrial release decision**
>
> The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference. . . . The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardships, interferes with their ability to defend themselves, and, in many instances, deprives their families of support . . . .

Part II of the Pretrial Release Standards then addresses "Release by Law Enforcement Officer Acting Without an Arrest Warrant." This Part begins by recommending generally that States adopt stat-

utes that favor citation over arrest for minor offenses:

> **Standard 10-2.1**
> **Policy favoring issuance of citations**
>
> It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

In particular, when a person is stopped for a minor offense, the Standards recommend that release be required once a citation has been issued, unless facts that reasonably suggest danger or a likelihood of non-appearance are present. App. 5. Specific factors that would permit arrest even for minor offenses are laid out, including whenever "necessary to ensure the safety of any person or the community." Standard 10-2.2(c), App. 5–6. This is the Standard that Virginia adopted in the statute that the Virginia Supreme Court found was violated here:

> **Standard 10-2.2**
> **Mandatory issuance of citation for minor offenses**
>
> (a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court.

. . .

(c) The defendant may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community, or when the accused:

(i) is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(ii) refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) has no ties to the jurisdiction reasonably sufficient to ensure the accused's appearance in court and there is a substantial likelihood that the accused will refuse to respond to a citation;

(iv) previously has failed to appear in response to a citation, summons, or other legal process for an offense;

(v) is not in compliance with release conditions in another case, is subject to a court order or is on probation or parole; or

(vi) poses a substantial likelihood of continuing the criminal conduct if not arrested.

Standard 10-2.3 then encourages law enforcement agencies to promulgate regulations "to increase the use of citations to the greatest degree consistent

with public safety." App. 11. As the U.S. Department of Justice reported in Whitcomb *et al.*, *Citation Release*, *supra*, at 3, "the procedure is now in use in 45 states."

Finally, Standard 10-2.4 addresses "Lawful Searches," to make clear that if an officer makes a "lawful arrest" of an offender, and then decides to cite and release the offender, the subsequent release on citation "should not affect the lawfulness" of any prior search conducted incident to that lawful arrest. App. 12. However, as the Commentary to Standard 10-2.4 notes, "once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent." App. 13 n.31.

> **Standard 10-2-4**
> **Lawful Searches**
>
> When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.
>
> **Commentary**
>
> The Fourth Amendment to the United States Constitution permits the police to perform warrantless searches of defendants incident to lawful arrest. [n. 31]
>
> n.31: . . . once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view). *See* Knowles v. Iowa, 525 U.S. 113 (1998) . . . .

C. The Rationale for the ABA's "Citation and Release" Standards, Pretrial Release Standards 10-2.1 to 10-2.4, Reflects a Realistic, Balanced, and Reasonable View.

The overarching rationale for the ABA's citation and release Standards is clear: when there are no factors present that reasonably counsel arrest (danger or a likelihood of non-appearance), then it is cost-effective for law enforcement agencies, as well as significantly more protective of individual privacy and liberty, to cite and release a minor offender rather than engage full-blown custodial arrangements. Arresting a minor offender, when no factors that reasonably counsel arrest are present, is simply unreasonable.

As the ABA noted in 1968 when it first promulgated Standards on Pretrial Release, "[t]he public . . . suffers when defendants are unnecessarily detained." *1968 Pretrial Release Standards*, at 3. Not only is needless expense incurred by government agencies when effectuating, processing, and maintaining custody, but individual liberty is unnecessarily sacrificed. *Id.*; *accord 2007 Pretrial Release Standards*, at 64, App. 3. Police agencies cannot realistically afford to take into custody all persons whom they have probable cause to believe have violated the law. Nor should persons who present no apparent danger nor risk of non-appearance be subjected to the disruptive and intrusive accoutrements that accompany a full-custody arrest and processing. In general, criminal offenses that are adjudged to be minor, as defined by the legislative branch that a democracy entrusts to

write the criminal laws, do not normally present events that reasonably require full custodial detention and processing after the citation process is complete.

Thus the diverse ABA membership, which includes many prosecutors as well as law enforcement personnel, has stated its balanced view: absent reasonable ground for further detention, probable cause to believe a defendant has violated a minor criminal law is not reasonably sufficient to justify further detention after the defendant has cooperated with the citation process.[4]

As the drafters of the ABA Standards recognized, however, any "citation and release" policy must sensibly balance the rationale for release against the serious needs of criminal law enforcement and the judicial system. Thus Standard 10-2.2 provides a number of reasonable exceptions to the policy of citation and release. The Commentary recognizes that "a bright-line rule prohibiting arrests for minor offenses is not appropriate." *2007 Pretrial Release*

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[4] The most detailed explication of the citation and release Standards' rationale appears in the Commentary to the Second Edition of the Pretrial Release Standards, *supra*, at 10-22 to 10-29. "[A]rrest ought not to be the automatic response to every criminal law violation. When arrest serves no legitimate purpose, police ought to be authorized—and in clear cases required—to utilize the less restrictive alternative of citation release." American Bar Association, *Standards for Criminal Justice, Pretrial Release* (ABA 2d ed. 1980) at 10-22. This Commentary also details that the ABA's policy here "is consistent with most other national standards," including that of the National Association of District Attorneys, the NAC, and the American Law Institute. *Id.*

Standards at 67, App. 9. Thus Standard 10-2.2(c) provides that even minor offense defendants "may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community . . . ." App. 5. In addition to this safety exception, the Standard permits arrest when the accused fails to identify him or herself or otherwise refuses to cooperate; has no ties to the jurisdiction; has previously failed to appear on a citation; is already subject to some other lawful restraint (court order, probation or parole); or is likely to continue the criminal conduct. *2007 Pretrial Release Standards*, Standards 2.2(c)(i) to (vi), App. 5–6.

As the Commentary to Standard 10-2.2(c) explains, these exceptions allow for "permissive" arrest discretion in the individual officer on the scene, while attempting to limit the "broad discretion" of officers that can sometimes result in harassment or discriminatory enforcement. *2007 Pretrial Release Standards* at 67, App. 9–10; *see, e.g.*, *Chicago v. Morales*, 527 U.S. 41, 65–66 (1999) (O'Connor, J., concurring with Breyer, J.) (noting need for specificity "to prevent 'arbitrary and discriminatory enforcement' of the law") (citation omitted). Absent reasonable grounds to arrest, the ABA's Standards reasonably circumscribe an officer's arrest authority.

D. Many Jurisdictions (Including Virginia) Have Adopted Citation and Release Policies, and Their Continued Use Reflects Their Reasonableness in Practical Operation.

The balanced reasonableness of the ABA's Pretrial Release Standards is demonstrated by the many

jurisdictions that have adopted some form of "citation and release" policy for minor offenses since 1968. The ABA is not aware of any current published source that gathers all such authorities—which is perhaps unsurprising because such provisions are not uniformly worded (making electronic database searching difficult), and are often scattered among dozens if not hundreds of minor criminal violation statutes rather than in a general statutory section as Virginia has chosen. Nevertheless, over 20 years ago the U.S. Department of Justice's National Institute of Justice reported that "all but nine States" had adopted such policies, and that citation and release procedures were in use in at least 45 States. Whitcomb *et al.*, *Citation Release*, *supra*, at 3. Similarly, in this case, the *Amici* Brief filed by Texas's prosecutors and other States, supporting the petitioner, notes that "many jurisdictions have chosen to limit warrantless misdemeanor arrests." Brief *Amici Curiae* of Texas *et al.*, at 24–26 & n.6 (providing examples).[5] The ABA's own recent research reveals the statutes cited in the following footnote from at least 26 jurisdictions (24 States plus the District of Columbia and Guam), that express "citation and release" statutory requirements for some minor of-

[5] It is significant that this *Amici* Brief in support of the Petitioner, as well as the Brief of Petitioner in this case, is filed by the chief prosecution authority in the listed jurisdictions, and not the legislative authorities of those jurisdictions. Presumably the legislatures of jurisdictions that have adopted and retained citation and release statutes and rules would defend those policies as reasonable.

fenses.[6] *Amicus* has no doubt that there are many, many more such policies in place across the country.

This Court has noted that the "ultimate touchstone" for Fourth Amendment analysis is "reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). The reasonableness requirement appears in that Amendment separate and apart from a requirement of probable cause.[7] The ABA respect-

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[6] "Mandatory" release (with exceptions): Alabama (Code of Ala. § 2-2-14.1 (2007)); California (Cal. Veh. Code §§ 23222(b); 40500; Cal. Pen. Code § 836.5 (2007)); Colorado (Colo. Rev. Stat. §§ 18-18-406(2), 42-4-1707 (2007)); Iowa (Iowa Code § 805.16(1) (2006)); Kentucky (Ky. Rev. Stat. Ann. § 22-2408 (2007)); Minnesota (Minn. R. Crim. P. 6.01(1)(a) (2005)); Nebraska (R.R.S. Neb. §§ 29-422, 60-684 (2007)); New Mexico (N.M. Stat. Ann. §§ 31-1-6, 66-8-123(A) (2007)); Ohio (Ohio Rev. Code Ann. § 2935.26(A) (2007)); Pennsylvania (Pa. R. Crim. P. § 519(B)(1) (2007)); South Dakota (S.D. Codified Laws § 32-33-2 (2007)); Tennessee (Tenn. Code Ann. § 55-10-207(a)(1) (2007)); Texas (Tex. Penal Code § 49.031(e) (2007)); Vermont (V.R. Cr. P. Rule 3 (2007)); and Virginia (Va. Code Ann. § 19.2-74 (2007)). Permissive release: Alaska (Alaska Stat. § 12.25.180 (2007)); Arkansas (Ark. R. Crim. P. Rule 5.2); District of Columbia (D.C. Code § 23-1110 (2007)); Florida (Fla. R. Crim. P. 3.125 (2007)); Guam (8 Guam Code Ann. § 25.10 (2007)); Hawaii (Haw. Rev. Stat. Ann. § 803-6 (2007)); Kansas (Kan. Stat. Ann. § 22-2408 (2006)); Louisiana (La. Code Crim. P. Art. 211 (2007)); Nevada (Nev. Rev. Stat. Ann. § 171.1773 (2007)); and Utah (Utah Code Ann. § 77-7-18 (2007)).

[7] The Fourth Amendment, applicable to the States via the Due Process Clause of the Fourteenth Amendment, provides that "The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, and no warrant shall issue, but upon **probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV (empha-

fully submits that its citation and release Standards, developed by experienced lawyers, judges, and law enforcement personnel with a wide range of interests and experience, and consistently adhered to through three re-adoptions over four decades, represent a realistic, balanced, and reasonable policy. The Standards balance the legitimate needs, and scarce resources, of law enforcement, together with the legitimate concerns of individuals stopped for minor offenses who present no danger to others or of non-appearance. The fact that many jurisdictions have adopted citation and release policies further supports the ABA's submission. *Amicus* respectfully urges this Court to consider these policies as it evaluates the constitutional issues in this case.

II. As Applied to This Case, the ABA's Pretrial Release Standards Support the Conclusion of the Virginia Supreme Court That the Unlawful Arrest, and Subsequent Search, by Virginia Authorities Were Unreasonable.

In this case, the Virginia Supreme Court unanimously ruled that an arrest for the misdemeanor of driving with a suspended license violated a Virginia statute that requires, in the absence of circumstances that reasonably require further detention, citation and release rather than arrest. *Moore v. Virginia*, 636 S.E.2d 395, 396 & n.3, 399–400 (2006) (citing Virginia Code § 19.2-74(A)(1) ("when a police officer detains a person for a Class I misdemeanor,

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sis added). Indeed, by the Amendment's terms, "probable cause" refers only to warrants.

the officer 'shall . . . issue a summons . . . .'"). The Virginia Court affirmed the *en banc* Virginia Court of Appeals' determination that "the record is devoid of evidence" to support an exception to the statute. 636 S.E.2d at 396 n.3. Because Moore's full-custody arrest violated the Virginia statute, the Virginia Supreme Court ruled that there could be no "lawful[ ] . . . search incident to an arrest." *Id.* at 399–400.

This Virginia "citation and release" statute, adopted in 1974, was based directly on the ABA's Pretrial Release Standards as first promulgated in 1968. Those Standards expressly advocated that States and local jurisdictions adopt its recommended citation and release structure. *See 1968 Pretrial Release Standards,* Standard 2.2(a) ("Legislative or court rules should be adopted which enumerate the minor offenses for which citations should be issued."). The second and third editions of the Standards further emphasized this policy of state statutory adoption. *See 2007 Pretrial Release Standards*, Standard 10-2.1, App. 1 ("It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.")

Virginia (like many other States after the initial publication of the ABA Standards) conducted a "comparative analysis" of its State laws and practice *vis a vis* the ABA Standards, and recommended that "Virginia should consider amending its Code to provide for the issuance of citations in conformity with the [ABA] standard." Walck *et al.*, *Comparative*

Analysis, supra, at II-3 (regarding Pretrial Release Standards 2.1 and 2.2). The Virginia statute at issue in this case was the direct legislative product of that effort, and specifically of ABA Pretrial Release Standards 2.1 and 2.2.

The ABA's Pretrial Release Standards, if applied to the facts of this case, support two conclusions.

First, the arrest was unreasonable because, as the Virginia Supreme Court concluded, there were no facts reasonably suggesting that custody, beyond the detention needed to issue a citation, was necessary. The Virginia statute is consistent with the consensus view expressed in ABA Pretrial Release Standard 10-2.2(a), which requires a citation rather than arrest for minor offenses. The Virginia Supreme Court unanimously affirmed the Court of Appeals' finding that no facts suggesting an exception were present (again, directly equivalent to ABA Standard 10-2.2(c)). Thus the arrest was inconsistent with the consensus view of diverse law enforcement interests, as adopted in many jurisdictions and as expressed in the Virginia statute as well as the ABA's Standard 10-2.2.

Second, ABA Pretrial Release Standard 10-2.4 reflects a further broad consensus that a "lawful" arrest is required to conduct a search incident to arrest. Here, the arrest was unlawful under Virginia state law—a citation should have been issued, followed by release. The search incident to that arrest therefore violated the reasonable policy expressed in Pretrial Release Standard 10-2.4. The Commentary to Standard 10-2.4 makes clear that "once a citation is issued the police officer has no authority to search

unless a basis other than incident to arrest is apparent." *2007 Pretrial Release Standards* at 70 n.31, App. 13 n.31.[8] Absent such a standard, the risk of costly, inefficient, invasive and potentially pretextual searches is an unreasonable one. Officers could use unlawful arrests, or the citation process alone, to conduct otherwise improper searches. Such a practice would be inconsistent with the widespread, reasonable consensus policies expressed in the ABA Standards (as well as with this Court's recent decision in *Knowles v. Iowa*, 525 U.S. 113 (1998) (Fourth Amendment does not permit search "incident to citation")). There was no "lawful arrest" or "other basis" advanced by the Virginia officers in this case to support the search of respondent's person. On the facts of this case, application of the ABA Standards—which reflect decades of analysis, broad input from many criminal justice sectors, and the actual experience of many U.S. jurisdictions—confirms that the arrest in violation of state law, and the subsequent search, were unreasonable.

Consistently for almost four decades, the ABA has advocated a policy of "citation and release" for minor criminal offenses. Many jurisdictions have now adopted such policies. In light of the reasonable and balanced rationale, and widespread influence, of the ABA's Pretrial Release Standards, *amicus* requests that this Court take them into account when evaluating the Virginia Supreme Court's decision in this case. On the facts presented, the respondent's

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[8] In *Castle Rock, supra*, this Court expressly relied on the Commentary to the Criminal Justice Standards in evaluating the arrest policies at issue. 545 U.S. at 760–761.

unlawful arrest, and any search incident to that arrest, were unreasonable under the balanced, consensus views of the ABA Standards.

CONCLUSION

For the reasons set forth above, and consistent with its commitment to promoting improvements in the American system of justice, the ABA respectively submits that the Court should affirm the decision of the Virginia Supreme Court.

Respectfully submitted,

WILLIAM H. NEUKOM
Counsel of Record
PRESIDENT
AMERICAN BAR
ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000

OF COUNSEL:
PROF. RORY K. LITTLE
PETER J. DROBAC
JEFFREY W. MIKONI

Attorneys for Amicus Curiae
American Bar Association

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APPENDIX

Excerpt from
American Bar Association,
Criminal Justice Standards,
***Pretrial Release* (ABA 3d ed. 2007)**

PART II

RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10-2.1
Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

History of the Standard

This Standard is unchanged.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2007), 10-1.3
ALI, Model Code of Pre-Arraignment Procedure (1975), 120.2; 120.4; 130.3
NAC, Corrections (1973), 4.3
NAC, Courts (1973), 4.2
NCCUSL, Uniform Rules of Criminal Procedure (1987), 211; 221

NDAA, National Prosecution Standards (1991), 45.2

Commentary

In the historical context of the 1960's, the First Edition's recommendation that law enforcement agencies issue citations rather than make arrests whenever possible represented a fairly dramatic new direction in arrest practices.[25] However,

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[25] For historical background concerning arrests for minor offenses, *see* Wayne LaFave, *Arrest* (1965); Arthur L. Beeley, *The Bail System in Chicago*, *supra* note 17 at 154; Warner, "The Uniform Arrest Act", 28 Virginia Law Review 315, 346 (1942). By the late 1980's, many states had passed legislation relating to police arrest powers for minor offenses, but the majority retained the broad discretion of police officers to arrest, even for traffic offenses. *See* Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses", 62 Temp. L. Rev 221, 249-50 and notes.187-192 (1989) (collecting statutory and rule authority and finding that 28 states had no limitations on police discretion to arrest for traffic offenses and that of 22 states with limitations, many retain broad discretion or only "require the issuance of a citation in a small class of offenses."). As of the first decade of the twenty-first century, it appears that a significant number of states require or at least encourage the use of citations for traffic and other minor offenses. Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. Lago Vista*, 71 Fordham L. Rev. 329, 414 n. 497 (2002). The issue has received renewed interest in the wake of the Supreme Court decision in *Atwater v. Lago Vista*, 532 U.S. 318 (2001). There the Supreme Court held in a 5-4 decision that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. *Id.* at 323. The Court noted, however, that although the Constitution did not

(continued...)

emphasis on citation release (as well as "stationhouse" release) was a logical extension of bail reform presumptions favoring pretrial release and release under least restrictive alternatives as well as encouraging diversion from the justice system altogether. Bail reform activists argued that unnecessary detention was intrusive and unnecessary to secure the person's appearance at court. Moreover, it strained the capacity of police lock-ups and jails.

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restrict such arrests, many jurisdictions have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. *Id.* at 352. The Court also made clear that its ruling was not an endorsement of Atwater's arrest for a seat belt violation. Rather, in its view, state legislatures were the means to deal with the problem:

> It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation, for, as Atwater's own *amici* emphasize, it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. *Id.*

State supreme courts are also free to interpret their own constitutions differently, and the Ohio Supreme Court has rejected the *Atwater* rationale and construed the Ohio Constitution to prohibit warrantless arrests for minor misdemeanors in the absence of specified circumstances. See *State v. Brown*, 792 N.E.2d 175 (2003).

What was innovative in the 1960's had become a fairly widespread practice by the mid-1980s[26] and is fairly routinely practiced in many jurisdictions across the United States at the turn of the new century. This Third Edition Standard is consistent with previous editions in calling for use of citations to avoid unnecessary police custody when the requirements of prosecution and adjudication will be met without it.

There are several components to an effective citation release system that can help minimize the risk that a defendant may fail to appear in court on the return date specified in the citation. These include (1) accurate and reliable information about the background and living situation of the person whose release is being considered; (2) workable criteria for release or detention, with a presumption of release that is consistent with these Standards; (3) qualified decision-makers making the release decision (for example, trained police officers); (4) a short time period between the issuance of the citation and the date of the individual's scheduled court appearance as shown on the citation; and (5) the capacity for rapid follow-up in the event of non-appearance in court.[27]

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[26] *See* Debra Whitcomb *et al.*, *Citation Release* (Washington, D.C., National Institute of Justice, 1984).

[27] *Id.* at 43-50; also Mahoney *et al. supra* note 8 at 61-63.

Standard 10-2.2

Mandatory issuance of citation for minor offenses

(a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court. In determining whether an offense is minor, the police officer should consider whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

(b) Except as provided in paragraph (c), when a person in custody has been taken to a police station and a decision has been made to charge the person with a minor offense, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The defendant may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community or when the accused:

(i) is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(ii) refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission

of guilt and represents only the accused's promise to appear;

(iii) has no ties to the jurisdiction reasonably sufficient to ensure the accused's appearance in court and there is a substantial likelihood that the accused will refuse to respond to a citation;

(iv) previously has failed to appear in response to a citation, summons, or other legal process for an offense;

(v) is not in compliance with release conditions in another case, is subject to a court order or is on probation or parole; or

(vi) poses a substantial likelihood of continuing thecriminal conduct if not arrested.

(d) When an officer fails to issue a citation for a minor offense, but instead takes a suspect into custody, the law enforcement agency should be required to indicate the reasons in writing.

(e) Notwithstanding the issuance of a citation, a law enforcement officer should be authorized to transport or arrange transportation for a cited person to an appropriate facility if the person appears mentally or physically unable to care for himself or herself.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-2.2. Subsection (a) substitutes the term "minor offense" for "misdemeanor" and provides guidance for determining whether an offense is minor. Safety concerns are given a new prominence in subsection (a) and in the introductory clause of subsection (b) that replaces former (c)(iii). Subsections (c)(v) and (vi) are new. Subsection (e) replaces Second Edition, Revised Standard 10-2.5.

Related Standard

ABA, Criminal Justice Standards, Mental Health (1986, 1989), 7-2.1; 7-2.3-2.6

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Urban Police Function (2d ed. 1980), 1-1.1(b); 1-2.2(f); 1-3.4(b)

NAC, Corrections (1973), 4.3

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211, 221

NDAA, National Prosecution Standards (1991), 45.2(b)

Commentary

Standard 10-2.2(a)

This Standard calls for policies requiring police officers to issue citations (rather than to arrest the offender) for minor offenses, except in circumstances

specified in subsection (c).[28] It parallels Standard 10-3.2 requiring judicial officers to employ summonses rather than arrest warrants for minor offenses.

The term "minor offense" is used rather than the term "misdemeanor" because, in many jurisdictions, "misdemeanors" encompass violent or potentially violent crimes that do not, under the Standard, require citation release. For example, domestic violence has been criminalized by statute in many jurisdictions and classified as a misdemeanor in some places. Until the early 1980's, police made relatively few arrests in these cases. Over the past several decades, however, a number of jurisdictions have adopted domestic violence "mandatory-arrest" policies. Since then, there has been an ongoing debate about the wisdom of such policies.[29] Standard 10-2.2 neither precludes nor mandates arrest in domestic violence cases.

Standard 10-2.2(b)

This Standard's prohibition against continued police custody of a person who is arrested and then charged with only a minor offense is a logical extension of the prohibition in subsection (a) against

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[28] *Cf.* Standard 10-1.3 and commentary, *supra* (defining minor offenses).

[29] For a discussion of the history and research about domestic violence mandatory arrest policies, *see* Joel Garner and Jeffrey Fagan, "Victims of Domestic Violence" in Robert C. Davis *et al.*, *Victims of Crime* (Thousand Oaks, CA: Sage Publications, Inc., 1997).

taking a person into police custody for a minor offense. Both reflect the principle that pretrial custody by police is generally unwarranted for minor offenses.

Standard 10-2.2(c)

This Standard recognizes that a bright-line rule prohibiting arrests for minor offenses is not appropriate, and that exceptions to the citation presumption sometimes are warranted. However, rather than allowing police officers broad discretion to determine when exceptions should be made, this Standard provides a narrow list of circumstances under which police officers may exercise discretion. It permits police to temporarily detain a person in police custody when necessary to ensure the safety of any person or the community. It also permits such temporary detention when individuals fail to identify themselves, refuse to sign the citation, do not show evidence of local ties that are reasonably likely to ensure response to the citation, or have previously failed to appear in court in response to a citation, summons, or other legal process. Moreover, custodial arrests are allowed when the individual is not in compliance with release conditions in another case, is subject to a court order, or is on probation or parole, or when the individual is involved in criminal activity that is likely to continue or to repeat itself.

The list of specific circumstances under which temporary detention in police custody (pending prompt initial appearance before a judicial officer as provided in Standard 10-4.1) is not mandatory.

Rather, it is permissive, leaving the decision whether to arrest or issue a citation in these situations to the discretion of the police officer.

Standard 10-2.2(d)

This Standard is aimed at ensuring accountability in adhering to the policy regarding use of citations for most minor offenses. It requires the law enforcement agency to state in writing the reasons for not issuing a citation any time an arrest is made for a minor offense. Written records provide a basis for subsequent review of citation practices to ascertain whether arrest exceptions are made on an appropriate and even-handed basis.

Standard 10-2.2(e)

This Standard distinguishes between the police officers' law enforcement function and community care-taking function.[30] It clarifies that a police

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[30] Courts generally distinguish between the police investigative function (apprehension of criminals) and the caretaking function (protecting the public and coming to the aid of those in distress). *See e.g.* Stanberry v. State, 684 A.2d 823 (Md. 1996) (citing State v. Carlson, 548 N.W.2d 138, 141 (Iowa 1996). As one federal appellate court commented, a police officer is "expected to aid those in distress; combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety." United States v. Rodriguez-Morales, 929 F.2d 780 at 784-85 (1st Cir. 1991). In Cady v. Dombrowski, 413 U.S. 433 (1973), the Supreme Court noted that police officers often "engage in what for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or

(continued...)

decision to issue a citation to an individual who appears in need of mental or physical assistance does not preclude a decision to take or have the person taken to a care giving facility.

Standard 10-2.3
Regulations concerning citations

Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

History of the Standard

This Standard closely tracks subsection (b) of Second Edition, Revised Standard 10-2.3.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Urban Police Function (2d ed. 1980), 1-4.1; 1-4.2

NAC, Corrections (1973), 4.3

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acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211; 221

NDAA, National Prosecution Standards (1991), 45.2(c)

Commentary

This Standard calls for law enforcement agencies to promulgate regulations on the use of citations that are consistent with other standards in this Part. The regulations should provide specific guidance to officers on when citations are mandatory and when arrest may be appropriate. They should assist the officer in determining whether or not release poses a danger. Finally, the regulations should require that whenever police issue citations, they should seek specific types of information relevant to the released individuals' likelihood of appearing in court in response to the citation.

Standard 10-2.4
Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

History of the Standard

This Standard is unchanged.

Related Standards

NAC, Corrections (1973), 4.3

Commentary

The Fourth Amendment to the United States Constitution permits the police to perform warrantless searches of defendants incident to lawful arrest.[31] This Standard simply makes clear that there is no retroactive impact on the validity of such searches when the police subsequently determine that continued custody is not needed and accordingly release the defendant on citation.

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[31] *See e.g.*, Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Chadwick, 433 U.S. 1 (1977); Gustafson v. Florida, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973). Of course, even though the Fourth Amendment permits searches incident to arrests that do not result in the detention of the arrested person in a police or correctional facility, once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view). *See* Knowles v. Iowa, 525 U.S. 113 (1998), in which the Supreme Court invalidated a search when a police officer issued a citation on the scene instead of making an arrest for a traffic infraction.

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No. 06-1082

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ~~LAWYERS IN SUPPORT OF RESPONDENT~~

Pamela Harris
Co-chair, Amicus Committee
National Association of
Criminal Defense Lawyers
1625 I Street, N.W.
Washington D.C. 20006
(202) 383-5386

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Warrington S. Parker, III
Alexander M.R. Lyon
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104

Counsel for Amicus Curiae

December 10, 2007

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INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association that works in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with 35,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL and its members have a strong interest in ensuring that unauthorized and unreasonable arrests not be used to justify warrantless searches of criminal defendants.[1]

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[1] This *amicus* brief is filed with the consent of the parties, who filed letters of consent with the Clerk of Court in accordance with Supreme Court Rule 37.3(a) on October 16, 2007, and November 5, 2007. Pursuant to Supreme Court Rule 37.6, the *amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Viewed through the lens of the common law, which this Court has consulted in the past when considering the protections afforded by the Fourth Amendment, the arrest at issue in this case was wholly unreasonable. It cannot be justified. The fruits of any search incident to the arrest must be suppressed.

At common law, as articulated by English and American courts, a warrantless misdemeanor arrest is justified, and justifiable, only to the extent there is an affirmative grant of authority to make an arrest for the specific category of offense in question. As this Court has recognized, the precise scope of arrestable offenses under common law, as sometimes modified by statute, has varied over time as legislatures have changed or expanded the authority to arrest for misdemeanors. But throughout, an offense could not be the basis of a lawful arrest unless it fell within the universe of offenses for which there was express authority to arrest.

An arrest for an offense falling outside the scope of arrestable offenses—outside the express grant of authority—could never be justified and was always considered unreasonable. Precisely because such an arrest is unreasonable, common law dictated (and still dictates) that the officer who made such an arrest is liable for damages, including punitive damages.

Contrary to the State's argument, a warrantless misdemeanor arrest could not be justified under common law simply because there was probable cause to believe that a misdemeanor had occurred,

or even because the officer witnessed it. If the arrest is not authorized by a positive grant of authority to arrest for that offense, it is unreasonable—and neither probable cause to believe that the misdemeanor was committed, nor a good faith belief that it was committed, nor even witnessing its commission can make the arrest reasonable.

Applying these principles to this case, the arrest of Mr. Moore is unreasonable under common law because the State, itself, has declared it unreasonable by placing Mr. Moore's offense outside the universe of arrestable offenses. It should be considered unreasonable for purposes of the Fourth Amendment. And, because the arrest is unreasonable, so is any search that is incident to that arrest.

ARGUMENT

A. Common Law And Historical Practice Have Influenced This Court's Interpretation Of The Fourth Amendment's "Reasonableness" Requirement.

This Court has frequently looked to the common law and historical practice in defining the "reasonableness" requirement of the Fourth Amendment. Of special relevance here, the Court has placed significant emphasis on such evidence when evaluating the "reasonableness" of an arrest. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Payton v. New York*, 445 U.S. 573, 591 (1980); *United States v. Watson*, 423 U.S. 411, 418-22 (1976).

The evidence considered by the Court includes (1) English decisions, statutes, and legal commentators pre-dating the Framing, (2) early American law as expressed in State constitutions, Colonial and State statutes, and reported decisions, (3) early Congressional actions, and (4) historical practice within the United States since the Framing. *See Watson*, 423 U.S. at 418-22; *Wilson v. Arkansas*, 514 U.S. 927, 931-34 (1995); *Atwater*, 532 U.S. at 327-39.

In *Wilson*, for example, the Court relied on 17th and 18th century English law, 19th century State constitutional provisions and legislation, and 19th century American decisions relating to a law enforcement officer's need to announce his presence and authority prior to entering a home. 514 U.S. at 931-36.

And in *Watson*, in deciding whether it was illegal for a postal inspector to arrest a suspect for mail theft pursuant to a federal statute allowing warrantless arrests, 423 U.S. at 414, the Court considered the historical treatment of warrantless felony arrests in the English common law, 19th century American decisions, the Second Congress, and the then-recent ALI Model Code of Prearraignment Procedure, *see id.* at 418-22.

Sometimes, of course, the Court's analysis yields no consistent historical account that can inform Fourth Amendment interpretation. *See, e.g., Payton*, 445 U.S. at 598 (declining to resolve constitutionality of state statute allowing warrantless arrests by reference to common law alone where "the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted").

But where the historical record reflects a consistent common law tradition accepted by English and American courts, the Court has often relied on that tradition in deciding what is "reasonable" under the Fourth Amendment. *Watson*, 423 U.S. at 418-22; *Wilson*, 514 U.S. at 931-36.

As discussed below, there is a common law tradition with respect to the power to effect a warrantless misdemeanor arrest—it undermines the State's ahistorical arguments.

B. Under Common Law, There Is No Right To Make A Warrantless Arrest For A Misdemeanor Unless The Law Affirmatively Deems The Offense An Arrestable Offense.

At common law, a warrantless misdemeanor arrest was not justified—and not considered reasonable—unless the law affirmatively deemed the offense to be an arrestable offense. An arrest for the offense had to be authorized by some source of positive law. That authority could be granted by historical tradition, which allowed an arrest not for any misdemeanor, but only for the class of misdemeanors that qualified as breaches of the peace. Alternatively, that authority could be granted by legislative enactment, as this Court underscored in *Atwater*. 532 U.S. at 328, 337. Whatever the source, the affirmative grant of authority for a misdemeanor arrest had to be explicit.[2]

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[2] In *Atwater*, this Court noted that there were a variety of offenses that were considered a breach of the peace such that

(footnote continued...)

That was the rule in England. In determining whether an arrest was appropriate, courts were careful to identify the specific authority that justified the arrest. In *Regina v. Tooley*, 92 Eng. Rep. 349 (K.B. 1710), for example, the court undertook to determine whether defendants were answerable for a murder they committed when they sought to free a person who was claimed to be unlawfully arrested. Key to the court's decision was whether the arrest was authorized. Were it an unauthorized arrest, a murder claim could not be made, although there was still some debate

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the narrow definition offered by a party in that case was not viable. 532 U.S. at 329-39. *Amicus* does not seek to revive any contrary argument. Nonetheless, at common law, the right to arrest for an offense was not unlimited. For example, *Money v. Leach*, 97 Eng. Rep. 1075, 1088 (K.B. 1765), which *Atwater* cited for the proposition that the common law "in many cases, gives the authority to arrest," 532 U.S. at 332 n. 6, concluded that the general warrant at issue was "illegal and bad." 97 Eng. Rep. at 1088. In so holding, the court noted that no common law justification for the arrest had been offered. *Id. King v. Wilkes*, 95 Eng. Rep. 737 (K.B. 1763), also addressed whether a general warrant authorized an arrest. It is true, as noted in *Atwater*, that the *Wilkes* court mentioned that an arrest could be effected for a crime committed in the presence of a peace officer. However, that was dicta, at issue was not a warrantless arrest. It does not appear that the court, in a single sentence, sought to expand, overrule or suggest as wrong the common law tradition that cabined the authority to make warrantless arrests. *See also,* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortion and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 314-317 (2002) (discussing the breadth of common law authority to arrest for misdemeanors).

whether a manslaughter claim was viable. In reaching its decision, the court noted that the arresting officer had a warrant; however, the court was careful to note that the warrant did not authorize the arrest at issue. In the court's own words: "But taking him to be a lawful officer, yet that will not justify his acting any thing beyond his authority: it does not appear, that he ever acted under the recruit warrant; and though, if he see persons fighting, he may restrain them ex officio, or take up suspicious persons, yet the taking of this woman was not lawful . . . ." *Id.* at 351. In terms of the suspicion necessary to justify the arrest, the court noted that the right to arrest was not unfettered. "[I]t is not a constable's suspecting, that will justify his taking up a person, but it must be just grounds of suspicion . . . as if a felony had been done . . . ." *Id.* at 352. Continuing, the court noted that with regard to warrantless arrests, the authority to arrest was limited: "[A] constable cannot arrest, but when he sees an actual *breach of the peace;* and if the affray be over, he cannot arrest." *Id.* (emphasis added).

As any reader at the time would have understood, not every misdemeanor rises to the level of a "breach of the peace." So, the court's analysis confirmed that even if an officer personally witnessed a misdemeanor, he did not necessarily have the authority to make a warrantless misdemeanor arrest; in order to be legally permitted to make an arrest for a misdemeanor, it had to be a particular class of misdemeanor.

In *Derecourt v. Corbishley*, 119 Eng. Rep. 452 (K.B. 1855), the court faced a similar question—

whether the constable had the right to make the arrest. The issue was alternatively phrased as "[w]as what the constable did justifiable?" *Id.* at 453. In answering this question, the court noted that there were limitations to the right arrest. "I admit that for a mere misdemeanor which has passed by[,] the constable has no power to take up of his own authority." *Id.* The arrest at issue was, however, justified because the offense was a breach of the peace witnessed by the arresting official. *Id.* at 451, 453; *see also Cook v. Nethercote*, 172 Eng. Rep. 1443, 1445 (K.B. 1835) ("[T]he power is given [the constable] by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed . . . by obtaining a warrant.").

Courts in the United States adopted this tradition from England. Here, too, a warrantless misdemeanor arrest must be justified by some positive grant of authority, *i.e.*, it must be an offense for which authority has been granted to make an arrest. In granting the authority to arrest, states have adopted a variety of approaches. Some have defined offenses as felonies, thus broadening the right to arrest. *See Commonwealth v. Carey*, 66 Mass. 246 (1853). In *Carey*, the court noted that by statute the legislature had "in a great measure obliterated" the line between misdemeanors and other offenses. *Id.* at 252. Yet, despite noting the similarity between the misdemeanor at issue and those crimes defined as felonies, the court found an arrest to be illegal and improper because the conduct at issue remained a misdemeanor for which there was no granted authority to make the arrest. *Id.* at 253.

In some places, the common law rule has been supplanted by statute. For example, as the California Supreme Court has explained, "[a]t common law it was the general rule that a warrant was required for a misdemeanor arrest unless the offense amounted to a breach of the peace and was committed in the presence of the arresting officer." *In re Thierry S.*, 566 P.2d 610, 613 (Cal. 1977). But the legislature expanded the common law rule, giving an officer much broader authority to make a warrantless arrest for *any* misdemeanor committed in his presence. *Id.*; Cal. Penal Code § 836; *see also Atwater*, 532 U.S. at 327-45, 355-60 (discussing and citing state laws that expand the right to arrest for misdemeanors).

While respecting the legislative power to broaden the universe of arrestable offenses beyond those offenses recognized at common law, courts have still reaffirmed the basic proposition that it is impermissible for an officer to make a warrantless arrest for a misdemeanor without a grant of power. For example, the court in *Lyons v. Worley*, 4 P.2d 3, 5 (Okla. 1931), noted that Oklahoma's statutes granted more authority to officers to arrest for misdemeanors than that afforded at common law. Nonetheless, the court found that this expansion did not create the right to arrest beyond the specific grant of authority. "[W]hile the codifiers of our law saw fit to extend the authority to arrest without a warrant to all public offenses," the court found that further extension could not be allowed "except by bald judicial legislation," which the court refused. *Id.* at 6; *see also Phillips v. Fadden*, 125 Mass. 198, 201-02 (1878) (finding officer liable where he exceeded the expanded arrest authority of a public drunkenness statute); *Brock v. Stimson*,

108 Mass. 520, 522 (1871) (same); *Delafoile v. State*, 24 A. 557, 558 (N.J. 1892) (noting that an officer's common law powers allowed him to make a warrantless arrest for "*some* misdemeanors" (emphasis added)); *accord* 4 W. Blackstone, Commentaries On The Laws Of England 292 (noting that right to arrest without warrant extended to felonies and breaches of the peace).

To be sure, some cases suggest that the common law authority to arrest was broader. They render the "old established rule of the common law" as holding that an officer may arrest for *any* misdemeanor committed in his presence. *Carey*, 66 Mass. at 251-52; *see also, e.g., Watson*, 423 U.S. at 418; *Daering v. State*, 49 Ind. 56, 58-59 (1874). However, to use this Court's expression, this shorthand statement of the common law "tends to mislead." *Atwater*, 532 U.S. at 329.

For example, in considering the propriety of a warrantless felony arrest, in dicta the *Watson* Court broadly characterized common law as authorizing warrantless arrests for any misdemeanor committed in the presence of a peace officer. *See* 423 U.S. at 418. However, the authority the Court cited for this proposition establishes that the right to arrest for a misdemeanor was more circumscribed. Halsbury's Laws of England, cited by the Court, notes that the arrest authority was limited to arrests for a breach of the peace. 10 Halsbury's Laws of England 344-345 (3d ed. 1955). The law review article the Court cited was also careful to note that the common law rule was that the arrest authority depended on a breach of the peace committed in an officer's presence. *See* Horace L. Wilgus, *Arrest Without a*

Warrant, 22 Mich. L. Rev. 541, 547-50 (1924).[3]

C. An Arrest For An Offense That Was Not Arrestable Was Always Unreasonable Even If There Was Probable Cause.

The State posits that probable cause justifies any arrest whether it be for a felony or for a misdemeanor. Pet. Br. at 9, 14-17. However, such an argument finds no support in the historical record. The cases cited by the State also do not support the assertion. The question of whether there was authority granted to arrest for the offense in question was not raised or addressed.[4]

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[3] Other similar assertions can also be discounted for similar reasons. For example, the court in *Baltimore and Ohio Railroad Co. v. Cain*, 31 A. 801, 803 (Md. 1895), stated that "[i]t is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law and this is still the law." As in *Watson*, the authorities cited for this proposition confirm that it is an overly broad and inaccurate characterization of common law. *Derecourt v. Corbishley*, 119 Eng. Rep. 452 (1855), as noted, did not hold that the commission of any misdemeanor in the presence of a peace officer justified an arrest. The offense at issue was a breach of the peace for which, as noted, a warrantless arrest was authorized provided it was committed in the presence of a constable. The same is true of *Phillips v. Trull*, 11 Johns. 486 (N.Y. 1814), also cited by the *Cain* court.

[4] *See Davenpeck v. Alford*, 543 U.S. 146 (2004) (no argument made that statutes invoked did not authorize arrest); *Maryland v. Pringle*, 540 U.S. 366 (2003) (same); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (statute authorized arrest); *Whren v. United States*, 517 U.S. 806 (1996) (authority to effect traffic stop not challenged); *Florida v. Wells*, 495 U.S. 1 (1990) (authority to stop for

(footnote continued...)

In fact, at common law, an arrest for an unarrestable offense could not be justified, even where there was probable cause to believe, or irrefutable evidence to show, that an offense had occurred.

At common law, a warrantless arrest for an offense for which there was no authority to arrest was illegal and could not be considered reasonable. Indeed, precisely because such an arrest was unreasonable, English common law provided that an arrestee was fully within his rights to resist arrest if an officer tried to arrest him for a crime that was not subject to arrest. *See, e.g., Regina v. Tooley*, 92 Eng. Rep. 349, 350 (K.B. 1710). Moreover, the arresting officer was liable for damages to the arrested person for the unreasonable arrest. *See, e.g., Fox v. Gaunt*, 3 B.& Ad. 798 (K.B. 1832); *Coupey v. Henley*, 2 Esp. 540 (K.B. 1797). Such arrests were considered so unreasonable that the victim was entitled to punitive damages to deter the conduct and ensure full compensation. *See Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763); Anthony J. Sebok, *Punitive*

(continued from previous page)
speeding not challenged); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (authority to enforce laws prohibiting drunk driving law unchallenged); *Michigan v. DeFillippo*, 443 U.S. 31, 39-40 (1979) (statute authorized arrest); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (search followed lawful impoundment of car); *United States v. Robinson*, 414 U.S. 218 (1973) (authority to arrest not challenged); *Henry v. United States*, 361 U.S. 98 (1959) (statute gave authority to arrest); *Brinegar v. United States*, 338 U.S. 160 (1949) (statutory power to arrest not challenged).

Damages from Myth to Theory, 92 Iowa L. Rev. 957, 977 (2007).

These rules found acceptance in the United States. Here, as in England, arrestees are entitled (unless there are statutes abrogating the right) to resist arrest if the offense is outside the scope of arrestable offenses. *See Bad Elk v. U.S.*, 177 U.S. 529, 534-35 (1900); *Rafferty v. People*, 69 Ill. 111, 118 (1873); Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626, 636 (1970). Here, too, an officer is liable for damages for an arrest for an offense that should not have been subject to arrest. *See, e.g., Goold v. Saunders*, 194 N.W. 227, 229 (Iowa 1923); *Thamel v. East Hartford*, 373 F. Supp. 455, 458 (D. Conn. 1974); *Ashton v. Brown*, 660 A.2d 447, 472 (Md. 1995). And, a plaintiff suing for unlawful arrest may still obtain punitive damages. *See, e.g., D'Elia v. 58-35 Utopia Parkway Corp.*, 43 A.D.3d 976, 341-42 (N.Y. 2007).

And contrary to the State's argument, if an officer arrested a person for a misdemeanor that was not arrestable, the unreasonable arrest could not be justified on the ground that the officer had probable cause to believe that the offense had been committed. To be sure, as a general rule, in both England and here, an officer could always arrest so long as he had probable cause to believe the arrestee had committed a *felony*.[5] *See, e.g.,*

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[5] Some cases—particularly those decided around the time of the Framing—use the term "reasonable suspicion" and not "probable cause." There is a scholarly debate over what precisely the term "reasonable suspicion" meant; however,

(footnote continued...)

Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780) (considering the officer's "reasonable charge of a felony" as dispositive of the propriety of the arrest even if it were later found that no felony had actually been committed); *Davis v. Russell*, 130 Eng. Rep. 1098, 1102-03 (K.B. 1829) (same); *Daering*, 49 Ind. at 58-59 (noting that an officer could arrest for a felony based on probable cause); *Goold*, 194 N.W. at 229 (holding that defendant officer would be liable for injuries sustained when he accidentally shot the wrong perpetrator of mail robbery unless the officer could show "reasonable grounds for believing that the plaintiff was guilty").[6] That was because felonies were arrestable offenses.

But because not every misdemeanor was an arrestable offense, there was no such rule for *misdemeanors*. If the misdemeanor was not arrestable, the officer could not legally arrest. It did not matter that the officer had probable cause

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commentators are agreed that it meant that some evidence of wrong-doing was necessary. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977, 978-80 & n. 10 (2004).

[6] *See also Commonwealth v. Phelps*, 209 Mass. 369, 407-08 (1911) (felony arrest justified by probable cause); *Cook v. Hastings*, 150 Mich. 289, 290 (1907) (finding it significant in evaluating the propriety of arrest that there were no reasonable grounds to believe the arrestee had committed a felony); *Rohan v. Sawin*, 5 Cush. 281, 285 (Mass. 1850) (stating that an officer would be free from liability for a warrantless arrest if he had "probable and reasonable grounds for believing the party guilty of a felony").

to believe the arrestee committed the crime, or (as we have seen) even that the officer personally witnessed it. That is why the courts, both here and in England, have been careful to draw this sharp distinction between felonies and misdemeanors.

In *Fox v. Gaunt*, 3 B. & Ad. 798 (K.B. 1832), for example, the court rejected the argument that a warrantless misdemeanor arrest was permissible where there was probable cause to believe that the offense had occurred outside of the presence of the officer. In so holding the court stated that "[t]he instances . . . of an arrest on suspicion after the fact is over, relate to felony;" it noted that this distinction between a felony and a misdemeanor is a rule that "must be made absolute." *Id.* at 800; *see also Davis*, 130 Eng. Rep. at 1102. Our courts have followed the same distinction. *See Watson*, 423 U.S. at 421-23 (stating that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact," and that Section 120.1 of the Model Penal Code mirroring this part of the common law is "the rule Congress has long directed its principal law enforcement officers to follow"); *Ross v. Leggett*, 28 N.W. 695, 697 (Mich. 1886) (noting that, unlike misdemeanor arrests, felony arrests can be effected upon "proper information,—such information as would justify a reasonable man in acting upon it").

In keeping with these principles, our courts have followed the common law rule that "denied a police officer a 'good faith' or 'probable cause' defense in a suit for false arrest for a misdemeanor." *Thamel*, 373 F. Supp. at 458; *see also Ashton*, 660 A.2d at 472 ("The Court has

consistently held that probable cause is not a defense in an action for false imprisonment based upon a police officer's warrantless arrest for the commission of a non-felony offense."); *Gold v. Armer*, 124 N.Y.S. 1069, 1069 (App. Div. 1910) ("It follows that the question of reasonable cause was not an element bearing upon the plaintiff's right to recover.").

Not even actual guilt is a justification. In *Lyons*, for example, the arresting officer was found liable for common law trespass although plaintiff in the common law action had admitted to having committed a misdemeanor. The court allowed the common law claim to go forward because the misdemeanor statute, which expanded the common law rights to arrest, only authorized an arrest for a misdemeanor committed in the presence of the officer. 4 P.2d at 6. *Lyons* does not stand alone. In *Ross*, the court instructed the jury that a misdemeanor arrest could be considered illegal if not authorized even though the jury might find the arrestee committed the misdemeanor. 28 N.W. at 696-97. In *McCullough v. Greenfield*, 95 N.W. 532, 534 (Mich. 1903), the fact that the arrestee later pleaded guilty to the offense did not absolve the officer of liability for the initial illegal misdemeanor arrest. *See also State v. Hunter*, 11 S.E. 366, 369 (N.C. 1890) (despite arrestee's admission that he had been drinking, officer lacked authority to make misdemeanor arrest).

This is not to say that probable cause is completely irrelevant. Even though it will not make an otherwise unreasonable arrest reasonable, probable cause that a crime was committed is relevant to three issues.

First, although it is not a complete defense, probable cause to believe that a crime had been committed could be asserted to mitigate damages. "The law is well settled that, in an action for false imprisonment, plaintiff having made out a case of false arrest, it is 'for defendants to show, if they could, that they had probable cause, and this not to wholly defeat the action, but to mitigate the damages.'" *De Silva v. N.Y. Cent R. Co.*, 169 N.Y.S. 924, 925 (App. Div. 1918) (quoting *Parke v. Fellman*, 145 A.D. 836, 837 (N.Y. App. Div. 1911)); *see also Reuck v. McGregor*, 32 N.J.L. 70, 75-76 (N.J. Sup. Ct. 1866) (holding that probable cause should reduce damages in a case of wrongful citizen's arrest); *Palmer v. Me. Central Ry. Co.*, 42 A. 800, 804 (Me. 1899) ("Where the justification for an arrest fails, . . . the plaintiff is entitled to recover, at least, compensatory damages, . . . although the defendant may have acted in good faith, without malice, and upon reasonable grounds.").

Second, probable cause was relevant where an officer was being *criminally* prosecuted for making an improper misdemeanor arrest. "If [the officer] acted in good faith, upon reasonable and probable cause of belief, without rashness or negligence," he cannot be held criminally liable "because he is found to be mistaken." *Commonwealth v. Cheney*, 141 Mass. 102, 104 (1886). Still, good faith was no defense to the asserted wrongfulness of the arrest. *Id.* at 103.

Finally, probable cause is relevant to the issue of whether the arrest is appropriate if the offense at issue is an offense for which there is authority to arrest. If there is a statute that allows the officer to

arrest for the specific misdemeanor at issue, courts will seek to determine whether the arresting officer had probable cause to believe that the offense was being committed. *See, e.g., Coverstone v. Davies*, 239 P.2d 876, 879 (Cal. 1952) (collecting cases).[7]

This treatment of "probable cause" in the context of the warrantless misdemeanor arrest stands in contrast to the State's proposal that Mr. Moore's arrest was reasonable under the Fourth Amendment just because the officers had probable cause to believe he was driving on a suspended license. Under common law principles, this analysis fails because it does not matter whether there was probable cause to believe that Mr. Moore was driving on a suspended license or irrefutable proof that he was. The arrest was not authorized. It was, therefore, unreasonable.

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[7] Some cases that hold that an officer making an arrest for a misdemeanor has the duty to prove that the person arrested is actually guilty of the crime. *See, e.g., Phillips v. Fadden*, 125 Mass. 198, 201 (1878).

CONCLUSION

The argument that the warrantless arrest of Mr. Moore is "reasonable" because the officers had probable cause to believe he committed a misdemeanor finds no support in either English or American legal traditions. To the contrary, the arrest of Mr. Moore for an unarrestable offense was unreasonable at common law and should be considered unreasonable under the Fourth Amendment.

Respectfully submitted,

Pamela Harris
Co-chair, Amicus Committee
National Association of Criminal Defense Lawyers
1625 I Street, N.W.
Washington D.C. 20006
(202) 383-5386

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Warrington S. Parker, III
Alexander M.R. Lyon
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104

Counsel for Amicus Curiae

December 10, 2007

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No. 06-1082

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, IDAHO, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WYOMING AS *AMICI CURIAE* ON BEHALF OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General for Criminal Justice

R. TED CRUZ
Solicitor General
Counsel of Record

SUSANNA DOKUPIL
ADAM W. ASTON
Assistant Solicitors General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

Additional counsel listed on inside cover

Troy King
Attorney General of Alabama

Terry Goddard
Attorney General of Arizona

Dustin McDaniel
Attorney General of Arkansas

John W. Suthers
Attorney General of Colorado

Bill McCollum
Attorney General of Florida

Lawrence G. Wasden
Attorney General of Idaho

Michael A. Cox
Attorney General of Michigan

Jim Hood
Attorney General of Mississippi

Catherine Cortez Masto
Attorney General of Nevada

Kelly A. Ayotte
Attorney General of New Hampshire

W.A. Drew Edmondson
Attorney General of Oklahoma

Hardy Myers
Attorney General of Oregon

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania

Roberto J. Sanchez Ramos
Secretary of Justice
Commonwealth of Puerto Rico

Henry D. McMaster
Attorney General of South Carolina

Lawrence E. Long
Attorney General of South Dakota

Mark L. Shurtleff
Attorney General of Utah

Bruce A. Salzburg
Attorney General of Wyoming

QUESTION PRESENTED

Does the United States Constitution require the suppression of evidence obtained when a police officer makes an arrest based upon probable cause, if the arrest violates a provision of state law?

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INTEREST OF *AMICI*

The *amici* States appear as *amici curiae* in support of Petitioner, Commonwealth of Virginia. SUP. CT. R. 37.4.

The *amici* States have a strong interest in effective and efficient law-enforcement practices that comply with all federal constitutional mandates. Given the significant number of arrests and searches that occur each year, the States have a particular interest in a clear and uniform Fourth Amendment standard. The Court's definition of probable cause provides that standard.

Additionally, the States have an interest in retaining their flexibility to regulate their own law-enforcement procedures. If the States choose to do so, the Constitution permits them to provide their citizens with protections above and beyond those embodied in the Fourth Amendment. Concurrent with the ability to create new protections, the States are also permitted to craft the remedies for violations of these state protections. In this way, the States are able to maintain the criminal procedures that best serve each State's particular needs.

SUMMARY OF ARGUMENT

Nothing in the Court's Fourth Amendment jurisprudence prohibited Virginia's officers from arresting David Lee Moore, and then from searching him incident to that arrest. To the contrary, the Court has consistently held that an arrest based on probable cause, even for a minor traffic violation, does not violate the Fourth Amendment. Nor does a search incident to arrest.

States are permitted to provide protections in addition to those the Court has held that the Fourth Amendment requires. But when they do, any violation of such state law does not independently violate the Fourth

Amendment. Instead, the remedy for a violation of that protection must be found in state law. If the Fourth Amendment's exclusionary rule were expanded to cover state-law violations, then state legislatures and supreme courts would have the power to define the federal Constitution, a proposition this Court has expressly rejected. Because the Fourth Amendment did not preclude the challenged arrest, neither should it provide the remedy.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITTED THE ARREST—AND THEREBY THE SEARCH—BECAUSE IT WAS BASED ON PROBABLE CAUSE.

The parties agree that the officers had probable cause to stop Moore's car for a traffic violation. *See, e.g.*, *Whren* v. *United States*, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred."). Indeed, the Court has long held that the Fourth Amendment poses no general bar to searches incident to lawful arrests for traffic violations.[1] Thus, but for the Virginia statute, Moore would have no plausible challenge to the constitutionality

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1. *See, e.g.*, *Thornton* v. *United States*, 541 U.S. 615, 621 (2004) (allowing search of an automobile compartment incident to the driver's arrest for license tags issued to a different car); *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (noting an officer's authority to arrest "for a fine-only traffic violation (speeding)"); *Gustafson* v. *Florida*, 414 U.S. 260, 266 (1973) (upholding a search incident to arrest for driving without a valid license); *United States* v. *Robinson*, 414 U.S. 218, 220 (1973) (finding constitutional a search incident to arrest for driving with a revoked license).

of his search. But violating a state statute is not the same as violating the Constitution, and Moore cannot convert a simple state-law violation into a constitutional one.

A. The Constitution Permits Arrest for Minor Offenses, Such as Driving With a Suspended License, When Based on Probable Cause.

The Fourth Amendment permitted the officers to arrest Moore for driving with a suspended license. The Court has held that the arrest of a driver for a minor traffic offense does not violate the Fourth Amendment. In *Atwater* v. *City of Lago Vista*, a woman violated a law requiring her and her passengers to wear seatbelts. 532 U.S. 318, 323-24 (2001). An officer stopped and arrested her, and she challenged the arrest as an "unreasonable seizure." *Id.*, at 325. The Court concluded, based on the original understanding and history of the Fourth Amendment, that a warrantless arrest for a misdemeanor committed in the officer's presence was not unconstitutional: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.*, at 354.

Moore's arrest for driving with a suspended license is constitutionally indistinguishable from Atwater's. Moore committed a minor traffic violation in the presence of an officer, and he was arrested. Just as the Fourth Amendment did not preclude Atwater's arrest, neither does it preclude Moore's. *See Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for . . . a misdemeanor committed in the officer's presence[] is consistent with the

Fourth Amendment if the arrest is supported by probable cause.").

The only difference between Moore's arrest and Atwater's concerns state law, namely that the seatbelt law in *Atwater* specifically permitted the officers to arrest, 532 U.S., at 323, and the statute in this case specifically prohibited it, VA. CODE §46.2-301(C). This distinction, however, is not constitutionally significant. *Atwater* held that an arrest such as Moore's is consistent with the Fourth Amendment. As such, the search incident to that arrest must also be constitutional.

B. A Search Incident to a Lawful Custodial Arrest Is Constitutional.

The Court's precedents are unequivocal that a search incident to a lawful custodial arrest, even for a minor crime, is constitutional. "The fact of a lawful arrest, standing alone, authorizes a search." *Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979). In *United States* v. *Robinson*, the Court created a bright-line rule that all warrantless searches of a person incident to a lawful custodial arrest satisfy the Fourth Amendment, noting that "the fact of the lawful arrest . . . establishes the authority to search," and "in the case of a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." 414 U.S. 218, 235 (1973).

Robinson involved an arrest virtually identical to the arrest at issue here. In *Robinson*, an officer had probable cause to stop a driver for operating a vehicle after the revocation of his permit. 414 U.S. 218, 220 (1973). The

officer effected a custodial arrest, searched the driver's person, and found heroin. *Id.*, at 221-22. Similarly, in this case, officers stopped a driver for operating on a suspended license, effected a full custodial arrest, complete with *Miranda* warnings, searched Moore, and found "approximately 16 grams of crack cocaine" which "[h]e admitted . . . was his." *Virginia* v. *Moore*, 636 S.E.2d 395, 396 (2006); VA. CODE §46.2-301(C).

The only distinction between this case and *Robinson* is that the statute in *Robinson* required an arrest. *See United States* v. *Robinson*, Brief of Respondent, 1973 WL 172612, at *5 (1973). But the Court held in *Gustafson* v. *Florida*, a case decided on the same day as *Robinson*, that it did not "find these differences determinative of the constitutional issue." 414 U.S. 260, 265 (1973). *Gustafson* stated that "[i]t is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the prisoner into custody." *Id.*, at 265. If the Fourth Amendment allows a search incident to a lawful custodial arrest, and the arrest is constitutionally lawful, then the search is also constitutional. *Id.*, at 267 (Stewart, J., concurring) (noting that if the custodial arrest was constitutional, "it follows that the incidental search of his person was also constitutionally valid" under *Robinson*).

C. The Virginia Supreme Court Erred in Relying on *Knowles v. Iowa*.

Moore's arrest violated a Virginia law that required police only to issue a summons. VA. CODE §46.2-301(C). This fact, though significant under Virginia law, cannot render an otherwise-constitutional search unreasonable.

The Virginia Supreme Court concluded, however, that the officers' state-law violation required a federal constitutional remedy. It held that because Moore's arrest was unlawful under state law, the officers lacked probable cause to search incident to that arrest. *Moore*, 636 S.E.2d, at 400. In reaching that conclusion, the Virginia Supreme Court relied heavily on the Court's decision in *Knowles* v. *Iowa*, 525 U.S. 113, 118-19 (1998), which "forbids expansion of the search incident to arrest exception to include a search incident to citation." *Moore*, 636 S.E.2d at 398.

1. *Knowles* is inapposite both in its reasoning and on its facts.

The Virginia Supreme Court's broad reading of *Knowles* does not withstand scrutiny. Unlike this case, in which the statute precluded arrest, the challenged Iowa statute authorized police either to arrest or issue a citation for speeding. *Knowles*, 525 U.S., at 114. Presumably, an officer could have probable cause to search incident to a lawful arrest under the statute. *See id.*, at 116 (declining to decide whether the statute could ever be lawfully applied). But, the officer searching incident to citation in *Knowles conceded* that he lacked either probable cause or consent to search incident to the citation. *Id.*, at 114-15. Rather, he relied solely on the Iowa Supreme Court's interpretation of state law to justify the search. *Id.*, at 115-16. It is that interpretation—that an officer may search incident to a traffic citation—that the Court reversed. *Id.*, at 116.

Knowles, then, presents the inverse of the question raised here. In *Knowles*, an otherwise-unconstitutional search was purported to be made legal by state law. In

Moore, an otherwise-constitutional search is being claimed to have been made illegal by state law. The *Knowles* Court held that a search incident to citation was unconstitutional and could not be legitimized by Iowa law. It did not even address—much less demonstrate—that an otherwise-constitutional arrest can be rendered unconstitutional by state law.

Even if *Knowles* stands for the proposition that all searches incident to citation are unconstitutional, that would not control this case. *Knowles* differs on its facts from *Moore* in another critical regard: Knowles was never arrested. He was stopped for speeding, issued a citation, and searched. *Knowles*, 525 U.S., at 114. Moore, by contrast, was arrested and read his *Miranda* warnings before he was searched. *Moore*, 636 S.E.2d, at 396. Thus, Moore's search was incident not to a citation, but to a full custodial arrest.

2. Under the Fourth Amendment, the arrest itself, not the type of offense, justifies the search.

Once the officer makes an arrest, even contrary to state law, the rationales justifying a search incident to arrest prevail. Under *Knowles*, if an officer has a choice between arrest and citation, but chooses citation, he loses the ability to search incident to that citation. *Knowles* declined to extend the search-incident-to-arrest exception to the warrant requirement to citations on the grounds that the rationales underlying that exception—"the need to disarm the suspect" and "the need to preserve evidence"—were not present. *Id.*, at 117. But where the arrest meets the threshold protections of probable cause

under the Fourth Amendment, then those rationales persist, even if the arrest violates state law.

The officer's relationship to the arrestee, not the nature of the arrestee's offense, is what justifies the search. "[I]t is the fact of the custodial arrest which gives rise to the authority to search," even if the officer has no "subjective fear" or suspicion that the arrestee "was armed." *Gustafson*, 414 U.S., at 266. "Every arrest must be presumed to present a risk of danger to the arresting officer." *Washington* v. *Chrisman*, 455 U.S. 1, 7 (1982). Indeed, "an arresting officer's custodial authority over an arrested person does not depend on a reviewing court's after-the-fact assessment of the particular arrest situation." *Id.* The officer does not even need to articulate his reasons for looking for weapons or evidence: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* (citing *Robinson*, 414 U.S., at 235).

Knowles agrees. The *Knowles* opinion explains at length that the custodial arrest situation differs dramatically from the citation situation. Arrest involves "extended exposure" to the suspect, and the danger "flows from the fact of the arrest and its attendant proximity, stress, and uncertainty, *and not from the grounds for the arrest.*" *Knowles*, 525 U.S., at 117 (quoting *Robinson*, 414 U.S., at 234-35 & n.5) (emphasis added). *Knowles* itself, then, highlights the importance of the link between the

fact of arrest and the constitutionality of the incident search.

The *Knowles* Court found the search incident to citation constitutionally infirm because it lacked the justifications present in a full custodial arrest. *Id.*, at 117. But Moore was, in fact, arrested. Thus, the officer's search was justified by the need to disarm and preserve evidence. *See Gustafson*, 414 U.S., at 266.

Here, the length of time Moore was with the officers further justifies the search. The officers arrested Moore and had him in custody, but "[b]ecause of a 'miscommunication' between the officers, they did not search Moore at the time he was arrested." *Moore*, 636 S.E.2d, at 396. They first took him to his hotel room, which Moore had expressly granted consent to search. *Id.* Regardless of when the officers searched Moore, the length of time required to travel to the hotel room and search it is the very same "extended exposure" to the suspect against which *Robinson* tried to protect. *See Robinson*, 414 U.S., at 234-35. As the *Chrisman* Court noted, "[t]here is no way for an officer to predict reliably how a particular suspect will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious." *Chrisman*, 455 U.S., at 7; *see also Thornton*, 541 U.S., at 621 (explaining that an "officer faces a highly volatile situation" when making an arrest during a traffic stop, whether or not the arrestee is in his vehicle). *Robinson*'s rationale justifying the search incident to arrest therefore applies equally to the officers in *Moore*.

The availability of other avenues for ensuring officer safety, *see, e.g.*, *Knowles*, 525 U.S., at 117-18, may demonstrate that a search incident to citation is unnecessary, but they do not suggest that, under the Fourth Amendment, a search incident to an arrest—even a wrongful one under state law—is unconstitutional. "The reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983).

The very fact of Moore's arrest, therefore, justifies the incident search. The arrest, in turn, was founded on probable cause because the police observed Moore committing an offense. Nothing in the Constitution itself or in the Court's precedents compels the conclusion that the police violated Moore's rights under the Fourth Amendment. To the contrary, they demonstrate that Moore's arrest and search were constitutionally sound.

II. State Law Prohibiting Arrest Cannot Defeat Constitutional Probable Cause Under the Fourth Amendment.

The search of Moore met all federal constitutional mandates. *See* Part I, *supra*. Only because Virginia law forbade arrest for the particular type of traffic violation committed here is the constitutionality of the search in question. The Virginia Supreme Court concluded that the statute negates probable cause—that is, because the officer only had discretion to issue a citation, he also lacked constitutional discretion to search. But, the practical effect of the Virginia Court's rule would be to allow state law to dictate the parameters of the Fourth Amendment. The Court has rejected this view, holding

that state law may provide protections above and beyond those granted by federal law, but it may not define the parameters of federal law itself. *California* v. *Greenwood*, 486 U.S. 35, 43 (1988) ("We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."); *Elkins* v. *United States*, 364 U.S. 206, 224 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers, ... [t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.").

Moreover, state-law authorization for police activity is not by itself determinative of that activity's constitutionality: "Just as a search authorized by state law may be justified as a constitutionally reasonable one under [the Fourth A]mendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Cooper* v. *California*, 386 U.S. 58, 61 (1967). Indeed, "when such state standards [imposing higher standards than required by the federal Constitution] alone have been violated, the State is free, without review by us, to apply its own state . . . rule to such errors of state law." *Id.*, at 62. Therefore, the relevant federal question is not whether the search violated state law, but whether the search was constitutionally reasonable in and of itself.

A. A State Law Cannot Diminish the Fourth Amendment's Probable Cause Standard.

States may not use their own laws to legitimize practices that fail to provide citizens with the federal

rights the Court has defined. The Court rejected a State's attempt to define constitutional protections through state law in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). There, the State's Attorney General signed warrants authorizing the search of a suspect's automobile. *Id.*, at 447. The Court held that the state law authorizing this practice was unconstitutional: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Id.*, at 449. Because the Attorney General "was not the neutral and detached magistrate required by the Constitution," the warrant he signed was constitutionally invalid. *Id.*, at 453. Thus, a State's laws must, at a minimum, offer its citizens the same protection against unreasonable searches and seizures that the Constitution provides.

B. State Law Cannot Expand, as a Matter of Federal Constitutional Law, the Fourth Amendment's Probable Cause Standard.

Likewise, state law cannot create additional federal constitutional protections beyond what the Court's precedents require. The Virginia Supreme Court has concluded, erroneously relying on *Knowles*, that if state law allows the officers to issue only a summons, then that state statute "negates . . . the existence of probable cause" to arrest. *Moore*, 636 S.E.2d, at 724. The Virginia Supreme Court, however, lacks the authority to extend *Knowles*'s holding that far. As explained above, the Court's precedents pose no bar to arrest for minor traffic offenses. *See* Part I.A, *supra*. The Virginia Supreme Court, in extending *Knowles*, has used a state statute

precluding arrest to deny constitutional probable cause where the Constitution itself has not done so.

In essence, the Virginia Supreme Court is interpreting the United States Constitution to provide greater protections than the Court's precedents. This it cannot do. The Court has thrice foreclosed that argument, in *Oregon* v. *Hass*, 420 U.S. 714 (1975), in *Arkansas* v. *Sullivan*, 532 U.S. 769 (2001), and in *Greenwood*, 486 U.S., at 43-44. In each case, state supreme courts attempted to "'interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court,'" and the Court found that was "'not the law and surely must be an inadvertent error.'" *Sullivan*, 532 U.S., at 772 (quoting *Hass*, 420 U.S., at 719 n.4). The Court responded each time that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions *as a matter of federal constitutional law* when this Court specifically refrains from imposing them." *Sullivan*, 532 U.S., at 772 (quoting *Haas*, 420 U.S., at 719).

Under this standard, the Virginia Supreme Court improperly used state law to define the Constitution. Its decision to expand the protection of *Knowles* beyond cases in which the officer had authority to arrest—and did not—to cases in which the officer had no authority to arrest—and did—places its own state statutes in a position to define Supreme Court precedent. To say that the Virginia Court has merely interpreted its law in light of *Knowles* is no answer. As explained above, *Knowles* neither controls nor addresses the specific facts here, and

its own facts and reasoning simply do not support the extension of its holding to this case.

C. The Court Has Held That State Law Does Not Determine the Constitutionality of an Arrest.

As *Coolidge* and *Knowles* explain, an otherwise-unconstitutional arrest cannot be made constitutional by an operation of state law. But the Court has gone even further, holding that a constitutional arrest and search—pursuant to an unconstitutional state law—is nonetheless constitutional.

In *Michigan* v. *DeFillippo*, the Court held that an officer had probable cause to arrest and search a suspect for violating a city ordinance in front of him, even though that ordinance was later declared constitutional. 443 U.S. 31, 40 (1979).[2] The Court noted that "there was abundant probable cause to satisfy the constitutional prerequisite for an arrest," *id.*, at 37, even though the ordinance itself was later held unconstitutionally vague. *Id.*, at 38. *DeFillippo* explained that "the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes . . . which purported to authorize the

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2. *DeFillippo* noted in dictum that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." 443 U.S., at 36. Yet, *DeFillippo* did not present the question of an arrest pursuant to a state-law violation. *Id.*, at 36 ("Respondent does not contend . . . that the arrest was not authorized by Michigan law."). Rather, the case turned on the presence of probable cause, which is not disputed here. *Id.*, at 37-40. Similarly, *United States* v. *Di Re*, 332 U.S. 581, 593-95 (1948), approved suppression of the fruits of a search incident to an arrest that violated a New York statute, but that case has since been implicitly overruled. *See, e.g., California* v. *Greenwood*, 486 U.S. 35, 43 (1988); *Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960).

searches in question without probable cause and without a valid warrant." *Id.* This reasoning is consistent with the holding in *Knowles*—that a state statute cannot legitimize an unconstitutional search. Likewise, the *DeFillippo* holding recognized that a statute's later invalidation cannot retroactively invalidate an otherwise-constitutional search. Here, as in *Knowles*, the underlying rationale for the holding is that probable cause does not turn on state statutory grounds. Rather, it is an independent constitutional inquiry.

III. UPHOLDING THE VIRGINIA SUPREME COURT'S DECISION WOULD HAVE PROFOUND CONSEQUENCES.

The Virginia Supreme Court's interpretation of the Fourth Amendment's application in this case would lead to startling results. Whereas the established standard of requiring only probable cause prior to an arrest and search provides clarity, certainty, and uniformity—hallmarks of the Court's Fourth Amendment jurisprudence—looking to individual state laws to provide the basis for searches permitted under the Fourth Amendment would introduce uncertainty and disparity into this settled area of law.

A. The Virginia Court's Interpretation Disturbs the Certainty and Uniformity that Have Served as a Basis for the Court's Fourth-Amendment Jurisprudence.

The Fourth Amendment's probable-cause standard provides a clear, readily-applicable rule for law enforcement officers. *See Texas* v. *Brown*, 460 U.S. 730, 742 (1983) ("[P]robable cause is a flexible, commonsense

standard."); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949) ("[T]he rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement."). The Virginia court's approach, however, would require—as a matter of federal constitutional law—both probable cause *and* compliance with all applicable state laws in order for a search to be permissible. But the Court "ha[s] never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *California* v. *Greenwood*, 486 U.S. 35, 43 (1988); *see also Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers . . . [t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."). And for good reason: the probable-cause standard provides uniformity and clarity; in contrast, a state-by-state, law-by-law inquiry promotes confusion and disparity, *see Atwater*, 532 U.S., at 347 ("[W]e have traditionally recognized that a reasonable Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."). Several examples demonstrate the confusion that could flow from allowing state law to define federal constitutional violations:

1. Situations in Which the Legality of an Arrest Under State Law is Not Immediately Determinable. There are a

number of scenarios in which law-enforcement officers might witness conduct that is both (1) clearly *illegal* under state law (and, thus, provides probable cause) and (2) not clearly conduct for which state law permits arrest. The Court noted a similar problem in *Atwater*. After recognizing that bright-line rules are commonplace in the Court's Fourth Amendment jurisprudence, the Court rejected Atwater's suggestion to draw a line between "'jailable' and 'fine-only' offenses, between those for which conviction could result in commitment and those for which it could not." *Id.*, at 347-49. The Court explained that "[t]he trouble with this distinction, of course, is that an officer on the street might not be able to tell [because] penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest." *Id.*, at 348. The same difficulty arises with respect to illegal conduct for which the legality of an arrest depends on the degree of the conduct.

One example is in the context of drug possession. As noted in *Atwater*, both the United States and Texas have laws making possession of one amount of a controlled substance a jailable offense, but the possession of a lesser amount a fine-only offense. *Id.*, at 349 n. 19 (citing 21 U.S.C. §§844, 844a; TEX. HEALTH & SAFETY CODE §481.121(b)). States have similar statutes with respect to the arrest-versus-citation distinction. *See, e.g.*, NEB. REV. STAT. §28-416(13)(a) (permitting arrest for more than one ounce of marijuana and requiring citation for less than one gram); *cf.* N.Y. PENAL LAW §§221.05, 221.10 (Posession of less than 25 grams of marijuana is a "violation" and possession of more than 25 grams is a misdemeanor.); N.Y CRIM. PRO. LAW §150.75 (A defendant arrested, without a warrant, for possession of marijuana is to be issued an

"appearance ticket") (New York case law is mixed as to whether this statute permits an arrest, and thereby permits a search). Under the Virginia Court's rule, the arresting officer would be required to determine the precise amount of a controlled substance the offender possessed prior to the arrest and search; otherwise—despite the probable cause clearly present at the time of arrest—a later determination that the amount possessed was insufficient to arrest under state law would require the exclusion of evidence obtained during the search.

Another example is in the context of theft. In Virginia, theft of an item worth less than $200 is a Class 1 misdemeanor, VA. CODE §18.2-96, for which an arrest is prohibited, *id.* §19.2-74. Theft of an item worth more than $200 is a felony, for which an arrest is permitted. VA. CODE §18.2-95. As the value of a stolen item may not be readily ascertainable at the scene, an officer who has probable cause to arrest might later find out that the arrest violated state law. Regardless how the State may choose to address that violation of state law when it is discovered, the probable cause—which is the Fourth Amendment's only requirement—existed at the time of the arrest, making the search constitutionally permissible. Not so under the Virginia court's approach.

Laws against speeding provide an example in the traffic-violation context. In Louisiana, an arrest is permitted for speeding if the driver is traveling more than fifteen miles-per-hour over the limit. LA. REV. STAT. §§32:57(C), (E)(2). Thus, an officer who clocks a driver traveling more than fifteen miles-per-hour over the limit would have probable cause to arrest and search the driver.

Although the driver may later challenge the accuracy of the radar gun used, and he may in fact demonstrate that he was traveling at a speed at which the arrest was impermissible under Louisiana law, that cannot defeat the probable cause that existed at the scene permitting the search.

In each of these examples, and there are countless others, the illegality of the *conduct* would not be in dispute. Thus, probable cause would plainly exist under the Fourth Amendment. It is only the legality of the *arrest* under state law that might be questioned, or even disproved, at a later date. Requiring the application of the exclusionary rule to these circumstances—where probable cause most certainly existed at the time of arrest—would inject considerable uncertainty into the Court's Fourth Amendment jurisprudence.

2. Technical Deficiencies in the Arrest. There are many technical deficiencies with respect to a particular arrest that might violate state law. For example, an officer may effect an arrest outside of his territorial limits,[3] a non-uniformed arresting officer may fail to properly identify himself,[4] or an officer's commission may be defective.[5] The

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3. *See, e.g., Maine* v. *Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (refusing to apply a *per se* rule that evidence obtained during an arrest effected by an officer outside her territorial jurisdiction is to be excluded); *People* v. *Wolf*, 635 P.2d 213, 217-18 (Colo. 1981) (denying a motion to suppress "[d]espite the fact that the Denver police violated the statutes governing their authority to arrest").

4. *See, e.g., Drewitt* v. *Pratt*, 999 F.2d 774, 777 (CA4 1993) (officer's failure to display a badge, in violation of Virginia law, "did not rise to a violation of a federal constitutional magnitude").

5. *See, e.g., United States* v. *Jones*, 185 F.3d 459, 462-63 (CA5 1999).

Fourth Amendment was not adopted to address minor violations of state arrest laws. *See Atwater*, 532 U.S., at 339-40 ("[T]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers.") (internal citation omitted). Nevertheless, the Virginia court's approach would require the exclusionary rule be applied to evidence obtained during these searches. As these minor state-law deficiencies are wholly unrelated to the question whether the arresting officer had probable cause, they do not give rise to Fourth Amendment violations. To require, as a matter of federal constitutional law, the application of the exclusionary rule for these defects would be inappropriate. *See Hudson* v. *Michigan*, 126 S.Ct. 2159, 2163 (2006) (explaining that the exclusionary rule is "applicable only 'where its remedial objectives are thought most efficaciously served'") (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)); *see also People* v. *McKay*, 41 P.3d 59, 69 (Cal. 2002) ("What good would be gained, after all, by invoking the federal Constitution to exclude evidence seized following an arrest merely because, in violation of state law, a nonuniformed police officer failed to display a badge . . . . Constitutionalizing the myriad of technical state procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules").

In each of these examples, the Virginia court's approach would require the officer to conclusively determine whether an arrest is permissible under state law prior to an arrest and search. If the officer did not

accurately make this often-difficult determination at the scene, the Virginia court would require the application of the exclusionary rule to evidence collected during a search, despite the clear probable cause. The Constitution does not require—and the need for a bright-line rule to guide law-enforcement officers counsels against—such an approach. As the Court has explained, a particular search or seizure is constitutional, or not, at its outset; a search that began without probable cause cannot become constitutional if the officers establish probable cause during the search. *See Di Re*, 332 U.S., at 228-29. But this necessarily also means that a search that began with the constitutionally-required probable cause cannot be rendered unconstitutional because it is discovered, after the fact, that an arrest violated a particular state law.

For the Court to hold that a violation of a state arrest statute is a violation of the Fourth Amendment—and thereby requires the "massive remedy" of the exclusion of evidence, *Hudson,* 126 S.Ct., at 2166—"would generate a constant flood of alleged failures to observe [state] rule[s]. . . . The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card," *id.*

B. If a Violation of State Law Requires a Constitutional Remedy, the Availability of That Remedy Would Vary State-to-State, Creating Anomalies Between States and in Application of the Court's Precedents.

If Moore and the Virginia Supreme Court are correct, state legislatures could create fifty different standards for when the exclusionary rule is required. While it is altogether fitting and proper for state laws to vary, the

Constitution should have a uniform interpretation and application. In tying a federal constitutional remedy to a state-law violation, Moore's position not only creates conflicts in the application of the Court's precedents, but also curtails the States' freedom to craft their own remedies, devaluing States' rights to develop individual methods of dealing with state-law violations.

1. If a violation of state law requires a constitutional remedy, results in subsequent cases could conflict with the Court's precedents.

The Court's precedents, like its interpretation of the Constitution itself, should have a uniform application across all fifty States. If state laws may redefine what constitutes a Fourth Amendment violation, however, then the Court could face interpretations of the Fourth Amendment under state law that directly conflict with its own prior precedents.

Atwater, for example, would come out differently based on differing state laws governing arrests for seatbelt usage. In Arizona, state law requires seatbelt usage but prevents officers from "stop[ping] or issu[ing] a citation to a person operating a motor vehicle on a highway in this state for a violation of this section unless the peace officer has reasonable cause to believe there is another alleged violation of a motor vehicle law of this state." ARIZ. REV. STAT. §28-909(C). If Moore's proposed rule were adopted, then an officer's stopping and arresting a person in Arizona for failing to wear a seatbelt would violate the Fourth Amendment. But, the very same arrest in Texas would comply with the Fourth Amendment under *Atwater*. Evidence found in a search incident to the Arizona arrest

would be suppressed, while in Texas it would be admitted. Drivers in Arizona would enjoy greater protections *under the federal Constitution* than drivers in Texas.

In Alabama, the same arrest would prove even more confusing. Alabama law provides that a violation of seatbelt law "shall not constitute probable cause for the search of the vehicle involved." ALA. STAT. §32-5B-5. If a violation of state law requires a federal constitutional remedy, then Alabama's rule would create direct conflicts with the Court's precedents allowing the search of an automobile's passenger compartment incident to a constitutional arrest. *See, e.g., Thornton*, 541 U.S., at 623-24; *New York* v. *Belton*, 453 U.S. 454, 462-63 (1981).

Louisiana law has a similar provision: "Probable cause for violation of this Section shall be based solely upon a law enforcement officer's clear and unobstructed view of a person not restrained as required by this Section. A law-enforcement officer may not search or inspect a motor vehicle, its contents, the driver, or a passenger solely because of a violation of this Section." LA. REV. STAT. §32:295.1(F). Thus, under Moore's proposed rule, the federal Constitution would give drivers in Louisiana more rights than drivers in Texas. Moreover, a driver observed without a seatbelt could not be searched incident to a lawful arrest, notwithstanding this Court's contrary decision in *Robinson*.

If the Constitution provides the remedy for a state-law violation, then violations of each of these state statutes would result in courts having to declare unconstitutional what this Court has expressly authorized. Evidence discovered by the police that would have been admissible under the Court's reading of the Constitution would now

be suppressed. If that is the rule, then the Arizona Legislature has reinterpreted *Atwater*; the Alabama Legislature has reinterpreted *Belton*; and the Louisiana Legislature has reinterpreted *Robinson*.

Federal constitutional rights should not vary from State to State. The Constitution provides a uniform standard for protecting citizens' rights against unreasonable searches and seizures. If States go beyond that minimum guaranteed protection as a matter of their own law, state law—not the Fourth Amendment—should provide the remedy.

2. The varied state-law approaches to misdemeanor arrests should—and often do—have state-crafted remedies.

State laws differ markedly in whether they allow an officer to effectuate a warrantless full custodial arrest for a misdemeanor committed in his presence, even though such an arrest does not fall short of the minimum standard required by the Constitution. *See Atwater*, 453 U.S., at 354.[6] Many of the jurisdictions that have

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6. Many jurisdictions have chosen to limit warrantless misdemeanor arrests. *See, e.g.*, KAN. STAT.§22-2401(d) (prohibiting arrest for minor traffic violation committed in officer's view); KY. REV. STAT. §§431.015(1), (2) (forbidding arrest for certain misdemeanors committed in the officer's presence); LA. REV. STAT. §32:391 (providing for the issuance of a summons); MD. TRANSP. CODE §26-202 (enumerating limited grounds for warrantless arrest); OR. REV. STAT. §810.401(3)(a) (prohibiting arrest for a traffic violation); MINN. R. CRIM. PROC. 6.01, subd. 1(1)(a) (mandating citation for misdemeanors); S.D. Codified Laws §32-33-2 (providing for summons); TENN. CODE §40-7-118(b)(1) (requiring citation rather than custodial arrest for certain offenses); TEX. TRANSP. CODE §543.004(a)(1) (providing for a "written notice to appear" for speeding or violating the open container

exceeded that minimum have also provided a corresponding state-law remedy.

In Alabama, for example, state law instructs officers to issue a citation for a misdemeanor traffic violation and then release the arrestee on bond. ALA. CODE §32-1-4(a)-(b). Alabama law also provides its own remedy: an officer failing to follow the guidelines "shall be guilty of misconduct in office and shall be subject to removal from office." *Id.* §32-1-4(c). Applying Moore's proposed rule to constitutionalize the violation of Alabama state law would require an increase in the remedy beyond that which the Alabama Legislature has provided.

Similarly, the California Vehicle Code requires officers to release certain arrestees upon a written promise to appear in court. CAL. VEH. CODE §40504. Using the exclusionary rule as a remedy, however, is the last resort under California law. Proposition 8, which amended Article I, section 28(d) of the California Constitution, "forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution

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law); VA. CODE §46.2-936 (requiring a summons for misdemeanor arrests).

Other States permit warrantless arrest for minor offenses observed by the officer, but only under specific circumstances. *See, e.g.*, ALA. CODE §32-1-4(a)-(b) (allowing citation and release); CAL. VEH. CODE §40504 (allowing citation and release); CAL. PENAL CODE §853.6(i) (enumerating exceptions to the cite-and-release rule).

Still others generally allow warrantless arrest for misdemeanors committed in the presence of the officer. *See, e.g.*, D.C. CODE §23-581(a)(1)(iv); NEB. REV. STAT. §29-404.02(1)(b)(4); VT. R. CRIM. P. 3(b); WYO. STAT. ANN. §7-2-102(b)(i).

as interpreted by the United States Supreme Court." *People* v. *McKay*, 41 P.3d 59 (Cal. 2002). "[But] Proposition 8 left intact the substantive scope of state statutory and constitutional rights against arrest for minor offenses. Violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief. Violation of those state rights also may subject the offending officer to an internal investigation, additional training, and departmental discipline." *Id.*, at 71–72 (citations omitted). Citizens of California expressly intended that the exclusionary rule not be the remedy for every state-law violation. Moore's proposed rule would directly contravene that intent.

Significantly, States regularly differentiate between a constitutionally valid and a statutorily valid arrest. In *McKay*, for example, the court concluded "that so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment." 41 P.3d, at 71. Similarly, the Maine Supreme Judicial Court and the Ohio Supreme Court both refused to apply the exclusionary rule where an officer violated a state-arrest statute, but had constitutional probable cause to arrest. *State* v. *Jolin*, 639 A.2d 1062, 1064 (Me. 1994); *City of Kettering* v. *Hollen*, 416 N.E.2d 598, 600 (Ohio 1980) ("[T]he exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights.").

IV. THE PROBABLE RESULT OF MOORE'S PROPOSED RULE WOULD BE *LESS* PROTECTION FOR INDIVIDUALS THAN IS CURRENTLY PROVIDED BY THE STATES.

Moore might argue that the Virigina Court's approach should be followed in order to provide the maximum protection to those arrested in violation of state law. But, in all probability, the opposite is true. Unless the States are free to craft their own remedies for arrests that violate state law without contravening the Fourth Amendment, they may well cease to provide such protections.

The Fourth Amendment provides both protection to individuals (a "floor" of rights that state action may not fall below) and a remedy for its violation (often—but not always—the exclusion of evidence). Critically, the protection offered by the Fourth Amendment is not the freedom from arrest, nor the freedom from search. Rather, it is the freedom from *unreasonable* search. U.S. CONST. amend. IV; *see United States* v. *Knights*, 534 U.S. 112, 118 (2001) (explaining that "the ultimate touchstone of the Fourth Amendment is 'reasonableness'"). With few exceptions, the reasonableness of a search "is not in doubt where the search or seizure is based upon probable cause." *Whren*, 517 U.S., at 817. And the arrest for minor traffic violations is permitted by the Fourth Amendment. *See Atwater*, 532 U.S., at 354-55.

As to remedies, the Court has explained that the "[s]uppression of evidence is our last resort, not our first impulse." *Hudson*, 126 S.Ct., at 2163. "Whether the exclusionary sanction is appropriately imposed in a particular case, is an issue separate from the question whether the Fourth Amendment rights of the party

seeking to invoke the rule were violated by police conduct." *Id.* (internal quotations omitted). Thus, even for Fourth Amendment violations, the exclusion of evidence is a "massive remedy." *Id.*, at 2166.

It is against this backdrop that States are free to provide their citizens with protections in addition to those afforded by the Framers in adopting the Fourth Amendment. Virginia has done just that by generally prohibiting arrest for Class 1 and 2 misdemeanors. *See* VA. CODE §19.2-74. Other States have likewise enacted statutes prohibiting or limiting arrest for a variety of minor crimes. *See generally* Part III, *supra*. But these protections have been enacted under the generally prevailing view that the violation of these *state statutory* protections does not create a *federal constitutional* violation requiring the drastic remedy of the exclusion of evidence. Should the Court hold here that any violation of one of these state statutes creates a Fourth Amendment claim upon which an arrestee may obtain the exclusion of evidence, the States will have significant incentive to eliminate protections above those mandated by the Fourth Amendment. *See United States* v. *Caceres*, 440 U.S. 741, 755-56 (1979) ("[W]e cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures . . . . [T]he result might well be fewer and less protective regulations."); *cf. Atwater*, 532 U.S., at 352 ("It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical

consideration without having to subsume it under a broader principle.").

The melding of state-law regulations into federal constitutional rights undermines the benefits of both: On the one hand, it mandates a uniform remedy for a broad spectrum of state statutory violations; on the other, it allows state laws to create variations in federal constitutional protections.

The Fourth Amendment cannot be defined by state statute. Rather, States should assume the responsibility for enforcing their own laws. As such, declining to enforce a mandatory exclusionary remedy for all state-law violations maintains both the need for state sovereignty in enforcing state laws and the need for uniformity in the enforcement of federal rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Virginia Supreme Court.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney Genera

ERIC J.R. Nichols
Deputy Attorney General fo
Criminal Justice

R. TED CRUZ
Solicitor General
Counsel of Record

SUSANNA DOKUPIL
ADAM W. ASTON
Assistant Solicitors General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

November 2007

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12pg No. 06-1082

In the

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF
~~THE VIRGINIA TRIAL LAWYERS~~ ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Virginia Trial Lawyers Association
700 East Main Street, Suite 1400
Richmond, VA 23219
(804) 343-1143

By: David B. Hargett
Counsel of Record
HARGETT & WATSON, PLC
11545 Nuckols Road, Suite C
Glen Allen, VA 23059
(804) 788-7111
Counsel for Amicus Curiae VTLA

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

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QUESTION PRESENTED

Is an arrest (and incident search) for a nonarrestable offense constitutionally unreasonable in violation of the Fourth Amendment?

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BRIEF *AMICUS CURIAE* SUBMITTED BY THE VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

COMES NOW the Virginia Trial Lawyers Association and files this Brief of Amicus Curiae in support of the Respondent, David Lee Moore, and supporting the decision of the Supreme Court of Virginia, in *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006).

STATEMENT OF INTEREST[1]

The Virginia Trial Lawyers Association ("VTLA") is an organization of over twenty-four hundred attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and rights, and supporting an efficient and constitutionally sound judicial system. The VTLA includes among its sections a Criminal Law Section, and VTLA members regularly participate in trials in state and federal courts.

The VTLA and its members clearly have a substantial interest in protecting and preserving the American system of justice and the rights of citizens. In this case, substantial questions of individual

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

rights under the United States Constitution are implicated. The VTLA, its members, and the citizens we represent, all have an important interest in constitutional rights, such as those maintained in the Fourth Amendment.

For the protection of our individual rights, the decision of the Supreme Court of Virginia should be affirmed.

SUMMARY OF THE ARGUMENT

When officers lack authority to arrest a suspect, an arrest is constitutionally unreasonable. A search incident to an unlawful arrest is also unreasonable and violates the Fourth Amendment.

The States have the power to criminalize certain conduct, or even label such conduct criminal or civil, and likewise the States have the power to authorize arrest for certain conduct. To conduct a Fourth Amendment analysis, courts must rely on the State's definition an offense, or – more specifically – the State's definition of an arrestable offense. It is neither contrary to the principles of constitutional analysis nor a State's rights to decide that an arrest under State law must be lawful under State law to pass constitutional muster as an arrest which justifies a search incident to arrest.

ARGUMENT

An arrest which is not authorized by State law, and therefore unlawful, is unreasonable under the Fourth Amendment, and so too is a search incident to an unlawful arrest.

The Fourth Amendment safeguards "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

It should be clear that an arrest for non-arrestable conduct is unreasonable. This conclusion is consistent with what the Framers of the Amendment might have thought to be reasonable. If the seizure of the person is unreasonable under the constitution, so too is the search of the person incident to the unlawful arrest.

As stated by the Respondent, the Fourth Amendment permits a search incident only to a "lawful arrest." *E.g.*, *United States v. Robinson*, 414 U.S. 218, 224 (1973); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948) (holding that an arrest in violation of state law also violated the Fourth Amendment because "[s]tate law determines the validity of arrests without warrant").

1. When law enforcement officers lack authority to arrest a suspect, a search incident to the unlawful arrest violates the Fourth Amendment.

Under the Fourth Amendment, the constitutional reasonableness of a custodial arrest is measured by whether probable cause existed for the arrest. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (confirming that the standard of probable cause applies to all arrests and holding that the Fourth Amendment does not proscribe any arrest made with probable cause).

In *Atwater*, this Court held that under the Fourth Amendment a warrantless custodial arrest based only on probable cause of a mere seatbelt violation, for which jail time was not authorized, was permissible. *Id.* The majority of this Court preferred to remain with what it considered the traditional probable cause standard for constitutional reasonableness, rather than to "mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness." *Id.* at 345-46. Thus, this Court held fast with probable cause as the test of reasonableness, "without the need to balance the interests and circumstances involved in particular situations." *Id.* at 354. This Court ultimately held that the arrest of the defendant satisfied constitutional requirements, and this Court stated,

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.*

In *Atwater*, Justice O'Connor dissented, disagreeing that the constitutional propriety of the custodial arrest, which she characterized as "the quintessential seizure," should be limited to whether probable cause existed. *See id.* at 360-62 (O'Connor, J., dissenting). In Justice O'Connor's view, the reasonableness inquiry required not only a determination of the existence of probable cause, but also an evaluation of the seizure under the standard rejected by the majority, namely, by assessing the intrusion upon individual privacy against the need to promote legitimate governmental interests. *Id.* at 361.

In the current matter, the question is in fact easier than balancing individual privacy interests against the need to promote legitimate governmental interests. If a person who probably has violated state law is not subject to arrest under state law, any such arrest is therefore unreasonable by every measure, including constitutional dictates. In other words, consistent with the Fourth Amendment, law enforcement officers must have "probable cause to arrest" a person for a suspected violation of State law, and "probable cause to arrest" should be prevailing standard here.

2. The States have the power to criminalize certain conduct, or even label such conduct criminal or civil, and likewise the States have the power to authorize arrest for certain conduct.

It should be beyond dispute that States have the power to criminalize certain conduct, and certainly some States might label certain conduct as "criminal" while other States may not. Furthermore, some States might establish punishment for the State law violation to include, for example, potential fines, jail time, prison time, execution, or some combination thereof.

As established in *Atwater*, the question is not whether the proscribed conduct could carry jail time; the question is whether the arrest was supported by probable cause. When evaluating the "probable cause" standard of reasonableness, the constitutional analysis is necessarily dependent upon the State law which defines and categorizes conduct. It is insufficient to say that the only reasonableness requirement is whether there is probable cause to believe that the person has engaged in certain conduct labeled "criminal." To conduct a Fourth Amendment analysis, courts must rely on the State's definition an offense, or – more specifically – the State's definition of an arrestable offense.

It is consistent with the principles of constitutional analysis to decide that an arrest under State law must be lawful under State law to pass constitutional muster as an arrest which is

"reasonable" and therefore justifies a search incident to arrest.

3. A search incident to an arrest when the arrest is unlawful under State law violates the reasonableness requirement of the Fourth Amendment.

Mere probable cause to believe some violation of some law is not a license to conduct any "search" or "seizure" at the whim of a law enforcement officer. *See, e.g., Knowles v. Iowa*, 525 U.S. 113 (1998) (probable cause of a citation-only offense does not justify search of individual's person); *Payton v. New York*, 445 U.S. 573 (1980) (probable cause does not justify entry into the home to conduct arrest).

If the officers lack the authority to arrest a person suspected of violating State law, the traditional justifications for the search incident to the arrest are not present. Like the situation in *Knowles*, when the arrest is not authorized, the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all.

Because officers will know whether they are allowed to arrest a person for a particular offense, there is no concern for certain variables that could materially alter the Fourth Amendment analysis of what is and is not constitutionally reasonable. The authority to arrest depends entirely on facts that are necessarily available to the officers and whether there is probable cause to believe that a person's conduct is subject to arrest under State law.

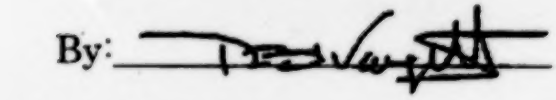
In short, regardless of the type or degree of punishment for a violation of State law, "probable cause to arrest" necessarily turns on whether State law classifies a violation subject to arrest. Here, the arrest was not permitted, and the subsequent seizure of the person was constitutionally unreasonable. Because the arrest was constitutionally unreasonable, the search incident to the arrest violated the Fourth Amendment, and the decision below should be affirmed.

CONCLUSION

According, the VTLA urges this Court to affirm the decision of the Supreme Court of Virginia.

Respectfully submitted,

THE VIRGINIA TRIAL
LAWYERS ASSOCIATION

By: 

Virginia Trial Lawyers Association
700 East Main Street, Suite 1510
Richmond, Virginia 23219
(804) 343-1143

By:

David B. Hargett, Esquire
HARGETT & WATSON, PLC
11545 Nuckols Road, Suite C
Glen Allen, VA 23059
(804) 788-7111
Counsel for the
Virginia Trial Lawyers Association

152

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

COMMONWEALTH OF THE STATE OF VIRGINIA

Petitioner,

vs.

DAVID LEE MOORE,

Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

KYM L. WORTHY
Wayne County Prosecuting Attorney

*TIMOTHY A. BAUGHMAN (P 24381)**
Chief of Research, Training and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

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* Counsel of Record

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of his constitutional and statutory duties, particularly with regard to child abuse and domestic violence cases.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

A. There Was No Fourth Amendment Violation

Amicus believes it wise always to begin with the actual language of the constitutional provision or provisions at issue, for reference only to the judicial gloss which has been given the relevant provisions or provisions can lead one far astray. As has been noted in a related context,

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.[1]

Amicus thus begins with the relevant text.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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1. *United States v. 12 200-Foot Reels of Super 8mm. Film,* 413 US 123, 127, 93 S.Ct. 2665, 668, 37 L Ed 2d 500 (1973).

Nowhere does the term "arrest" appear in the Fourth Amendment; the question here, then, is whether the custodial seizure of a person on probable cause that individual has committed a criminal offense under state law is an "unreasonable seizure" of the person under the Fourth Amendment, where state law requires that the person seized be released with a summons rather than taken into custody where none of several exceptions is met.

The Virginia Supreme Court found, contrary to the en banc Virginia Court of Appeals, that a custodial arrest for a criminal misdemeanor where, under state law, the detention of the individual charged should have ended on the writing of a summons after agreement of the arrestee to appear on the summons is not only a violation of state statute but of the Fourth Amendment as well. The search incident the custodial arrest revealing 16 grams of crack cocaine and $516.00 in case on respondent's person was therefore found improper and the evidence suppressed. The difference of opinion between the Virginia Supreme Court and the en banc Virginia Court of Appeals is predicated on their different views of *Knowles v. Iowa,* 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) and *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

In *Knowles* the defendant was not arrested by the police, though he could have been. Instead, he was given a ticket and released. Nonetheless he was subjected to a search incident arrest, including a search of his automobile, one permissible had he been, as he could have been, taken into custody rather than detained and cited. This Court held that where there is no arrest—even if one is permissible by law—there can be no search incident arrest. The Virginia Supreme Court found *Knowles* controlling, finding that even when there *is* an arrest on probable cause, if that arrest should not, as a matter of state

law, have been accomplished the Fourth Amendment is violated.

The en banc Virginia Court of Appeals, on the other hand, found only a violation of state law but no violation of the Fourth Amendment in this circumstance, largely in reliance on *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). There a woman was arrested and taken into custody for an offense which carried no possible penalty of incarceration but only a fine. This Court held the arrest proper. The en banc Virginia Court of Appeals held that because the officers had probable cause that respondent had committed a criminal offense, his arrest did not violate the Fourth Amendment. See *Moore v. Commonwealth,* 622 S.E.2d 253, 256 (Va.App.,2005). The Virginia Supreme Court found *Atwater* inapposite given the specific statutory authorization under Texas law for an arrest for violation of the seatbelt law that Atwater had violated. Because formal arrest was not authorized here by state law while the arrest was authorized in *Atwater*, the Virginia Supreme Court found that the en banc Virginia Court of Appeals had erred in concluding that the violation of state law was not a constitutional violation. See *Moore v. Commonwealth*, 636 S.E.2d 395, 398 (Va.,2006).

This morphing of violation of state statutes into constitutional violations is unsound; the en banc Virginia Supreme Court majority opinion has the better of the argument. The consequences for violations of state statutes should remain, under what Justice Harlan often referred to as "our federalism," with the various state legislatures, who, as the People's democratically elected representatives, may make the pertinent policy decisions involved.

The Fourth Amendment establishes the "floor:" arrests—seizures of individuals to hold them to answer for a crime (unless and until released on bail)—require probable cause. But as a matter of the Fourth Amendment, they require no more: "In conformity with the rule at common . law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). And *Atwater* itself, pointing in part to the need for clarity and simplicity, flatly stated that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, *without violating the Fourth Amendment*, arrest the offender" (emphasis added). To be sure, under some circumstances that arrest may violate *state* law, but those circumstances, and the consequences, if any, for the violation of state law, are within the purview of state legislatures.

One noted commentator has observed that this Court has "*never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of [a suspect into] custody was deemed unnecessary (as a matter of state law or otherwise). 1 LaFave, *Search and Seizure* § 1.5(b), p. 171 (4th ed.2004) (emphasis in original). Moreover, Professor LaFave has also expressed the view that violations of state law with regard to searches or seizures do not "by virtue of that fact become a Fourth Amendment violation." 1 LaFave, *Search and Seizure* § 1.5, p. 156 (4th ed.2004). This Court made the point in *California v Greenwood*, 486, US 35, 44 108 S Ct 1625, 1631, 100 L Ed 2d 30 (1988):

> Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs....Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

The same principle applies to seizures of the person. Whether a seizure is reasonable—when it takes the form of an arrest—does not "depend on the law of the particular State in which the [arrest] occurs," as the reasonableness of the seizure is not determined by the "concepts of privacy under the laws of each State"; rather, the arrest is constitutionally reasonable if based on probable cause to believe a state criminal law has been violated.

The petitioner has well stated the authority from other jurisdictions holding contrary to the Virginia Supreme Court, and amicus will not belabor the point, but will expand on only one example, that of warrantless misdemeanor arrests. Though this Court has never addressed the question whether the common-law requirement that arrests for misdemeanors are permissible only when the violation occurs in the presence of the arresting officer is a part of the Fourth Amendment's reasonable requirement, see *Atwater*, 532 US at 341; 121 S Ct at 1550, those courts that have addressed

the question have answered in the negative.[2] A state can, then, permit a misdemeanor arrest on probable cause, where the offense did not occur in the presence of the officer. But what if state statute codifies the common-law rule, and an arrest is accomplished on probable cause for an offense not committed in the presence of the officer? State law, in this circumstance, has added a layer of privacy to that provided by the Fourth Amendment, but whether to provide that extra protection is a matter of state law, and the consequences, if any, that should be imposed for the violation of state statute are also a matter for the state legislature. And a number of courts, such as the Michigan Supreme Court, have so held. See e.g. *People v. Hamilton,* 465 Mich. 526, 638 N.W.2d 92 (Mich, 2002).

The en banc Virginia Court of Appeals was correct and the Virginia Supreme Court mistaken. The arrest here was constitutional, as was the search incident arrest, under the Fourth Amendment.

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2. See e.g. *Street v. Surdyka,* 492 F.2d 368, 372 (4th Cir.1974), *Woods v. City of Chicago,* 234 F.3d 979, 992-95 (7th Cir.2000); *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir.1995); *Fields v. City of South Houston,* 922 F.2d 1183, 1189 (5th Cir.1991); *Barry v. Fowler,* 902 F.2d 770, 772 (9th Cir.1990); *Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Circ. 2002)("every circuit that has addressed the issue has held that the Fourth Amendment does not include an in-the-presence requirement for warrantless misdemeanor arrests").

B. Application of An Exclusionary Sanction Is Inappropriate Even If A Fourth Amendment Violation Occurred.

Even if this Court were to hold that the custodial arrest of respondent in circumstances where state law required issuance of a summons is unreasonable under the Fourth Amendment, no exclusionary sanction should apply. Amicus suggests that the exclusionary rule should be viewed as inapplicable in circumstances where, had a person innocent of any crime[3] brought suit under 42 U.S.C. 1983, application of principles of qualified immunity would result in dismissal of the action. If the conduct of the police is reasonable so that it would not result in the awarding of monetary damages, then exclusion of the truth in a criminal proceeding should not occur.

Assume a case where the Fourth Amendment is violated but no derivative evidence is found, and the individual aggrieved files suit based on the violation. The defendant officer is entitled to summary judgment on the grounds of qualified immunity if his or her mistake was reasonable though the result was a violation of the Fourth Amendment. An innocent person would receive no redress, and no "deterrent" sanction would be applied to the police. See e.g. *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (CA 8, 2005)("the qualified immunity privilege extends to a police officer who is wrong, so long as he is reasonable, the governing standard for a Fourth Amendment unlawful arrest claim 'is not probable cause in fact but arguable

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3. Or even guilty of one, for that matter, but he example of an innocence person well makes the point here.

probable cause···'"). But in that same situation, if evidence is found it is suppressed despite the reasonableness of the error of the police. This is a decidedly odd state of affairs.

Amicus submits that application of the exclusionary rule should occur only upon the confluence of two circumstances: 1)the determination at a suppression hearing of a but/for causal connection between the violation of the Fourth Amendment and the evidence discovered (and the absence of any exception to exclusion, such as independent source, purged, taint, attenuation, or inevitable discovery), see *Hudson v. Michigan*, ··· U.S. ····, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006); and 2)the conclusion by a judge after a suppression hearing[4] that the officer(s) involved would not be entitled to qualified immunity in a civil suit; that is, a conclusion that the error that occurred was unreasonable. See *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L Ed 2d 272 (2001). If causation is found lacking, or if the police would be entitled to qualified immunity either because a)the constitutional principle involved was not clearly established at the time of their conduct, or b)because it was so established but their mistake was reasonable, then exclusion of evidence should not

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4. The difference between the suppression hearing and the qualified immunity determination would be that at the suppression hearing under Rule 104(a) the judge must take necessary testimony and make credibility determinations and reach a final conclusion on the matter. But the inquiry as to whether a constitutional right has been violated, and whether the police error was reasonable, should be the same as in the qualified immunity situation.

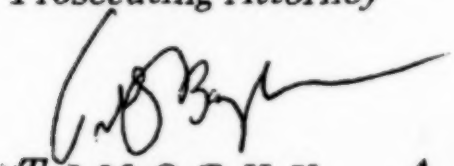
result, just as the payment of damages to an innocent (or even guilty) defendant would not result.

Here, then, if the conduct of the officers is found to violate the Fourth Amendment, exclusion should not result because there was no clearly established Fourth Amendment principle to that effect at the time they acted. Because qualified immunity would be granted in a civil suit, exclusion would be inappropriate here.

Conclusion

WHEREFORE, this Court should reverse the Virginia Supreme Court.

KYM L. WORTHY
Wayne County
Prosecuting Attorney



TIMOTHY A. BAUGHMAN
Chief of Research, Training, & Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Phone: 313-224-5792